SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. [redacted] 290

LOUISVILLE & NASHVILLE RAILROAD COMPANY ET AL., APPELLANTS,

versus

UNITED STATES OF AMERICA ET AL., APPELLEES.

APPELLANTS' PETITION AND MOTION FOR AN ORDER MAINTAINING THE STATUS QUO PENDING THIS APPEAL

and

BRIEF IN SUPPORT OF SAME.

H. L. STONE,
W. A. COLSTON,
CLAUDE WALLER,
EDWARD S. JOUETT,
Solicitors for Appellants.

SUPREME COURT OF THE UNITED STATES

LOUISVILLE & NASHVILLE RAILROAD COMPANY, ET AL., - - - - - - - - - - *Appellants,*

versus

UNITED STATES OF AMERICA, ET AL., - - *Appellees.*

APPELLANTS' PETITION AND MOTION FOR AN ORDER MAINTAINING THE *STATUS QUO* PENDING THIS APPEAL.

The appellants come by this petition and move this court for an order that will maintain the *status quo* herein by suspending, during the pendency of this appeal, the execution and enforcement of the Interstate Commerce Commission's order of February 1, 1915, whose validity is attacked in this suit, or rather by continuing in effect the lower court's temporary suspension thereof, which it granted for only thirty days upon the idea that a permanent suspension pending the appeal was within the jurisdiction solely of this court.

As grounds for such motion appellants show the following facts:

In a proceeding before the Interstate Commerce Commission based upon a complaint by the City of Nashville and others against appellants' switching practices at Nashville, Tenn., an order was entered by the Commis-

sion requiring appellants, Louisville & Nashville Railroad Company and Nashville, Chattanooga and St. Louis Railway, to switch competitive cars for the Tennessee Central Railroad Company at Nashville upon the ground that they switched such cars for each other, and hence that their failure to switch them for the Tennessee Central Railroad Company was an unjust discrimination. Thereupon said appellants (plaintiffs below) brought this suit (Rec., Vol. I, p. 4) against the United States, the Interstate Commerce Commission, and the other parties to said proceeding for the purpose of enjoining the execution and enforcement of the Commission's said order. The Louisville & Nashville Terminal Company was joined as a party to the proceedings before the Commission but it is not a railroad company and has no interest in the case.

The application for an interlocutory injunction and temporary restraining order was heard by the court composed of Circuit Judge John W. Warrington and District Judges John E. McCall and Edward T. Sanford at Nashville on April 20, 1915, but was not decided until September 18, 1915. Meantime no restraining order was issued, but at the suggestion of the court the Interstate Commerce Commission postponed the effective date of its order until after the court should reach a decision. The court in its opinion (Rec., Vol. I, p. 59) sustained the validity of the Commission's order, and stated that a decree would be entered denying an injunction and dismissing the bill; but before the decree was entered plaintiffs made application for it to contain a provision suspending

the Commission's order pending an appeal to this court which plaintiffs contemplated taking at once. After a full hearing upon this application, the court on October 22, 1915, filed its second opinion (Rec., Vol. I, p. 77) in which, after a review of the authorities, it upheld the plaintiffs' contention that a court of equity had inherent power to maintain the existing status, pending appeal, even though the bill was dismissed, decided that a temporary suspension pending appeal should be granted, and announced the following finding of facts and its conclusion based thereon:

> "It further appears from the affidavits submitted by the petitioners, which are not controverted, that in the event the decree of this court denying the injunction prayed by the petitioners and dismissing their bill should be reversed by the Supreme Court, a great and irreparable injury would in the meantime have resulted to the petitioners by reason of the diversion of part of their traffic entering and leaving Nashville by competing railroads enabled to obtain access to local industries on their lines through the enforcement of the order of the Interstate Commerce Commission, and the expense and disturbance of their business caused by changing their former practices in the meantime so as to comply with the order of the Commission and the publication of new tariffs. And, on the other hand, it does not clearly appear that any particular individuals would suffer material financial injury in the event the order of the

Commission is stayed for a short time so as to enable the petitioners to perfect their appeal and to present to the Supreme Court an application for a preliminary suspension order of the Commission pending the hearing of the appeal in the Supreme Court, in accordance with the practice recognized in Omaha Street Railway v. Interstate Commission, 222 U. S. 582, 583.

"It results, therefore, that in the opinion of a majority of the court, in view of the importance of the questions involved in this case, and the irreparable injury which will result to the petitioners from the enforcement of the decree in this cause, if reversed, unless a short stay is granted, that the decree whose entry has heretofore been directed denying the preliminary injunction and dismissing the petition, should, under all the circumstances of the case, in the exercise of a sound discretion, be modified so as to provide that if the petitioners shall within thirty days from the entry of such decree take and perfect an appeal to the Supreme Court and also present to that court, within such thirty days, a petition for a preliminary suspension of the order of the Commission pending the determination of such appeal, the enforcement of the order of the Commission should be stayed, until a decision by the Supreme Court upon the question of granting such preliminary suspension of the order of the Commission shall be rendered; provided, however, further, that in addition to the ordinary appeal bond,

the petitioners shall also, at or before the time of the allowance of an appeal, make and file in this court their bond, in the penal sum of $25,000, payable to the clerk of this court, with sureties to be approved by him, conditioned that in the event that petitioners shall not, within thirty days from the entry of such decree, take and perfect an appeal to the Supreme Court and also present to that court, within such thirty days, a petition for a preliminary suspension of the order of the Commission pending such appeal, or in the event the appeal from the decree of this court is dismissed by the petitioners or the decree of this court denying the interlocutory injunction and dismissing the petition is affirmed by the Supreme Court, they will, on demand, pay to the party or parties entitled thereto, all legal damages accruing to them by reason of the stay of the order of the Commission granted by such decree."

The final decree, modified by the insertion of said stay provision, was duly entered on October 22, 1915. (Rec., Vol. I, p. 81.)

Appellants, presenting this petition and motion pursuant to said order, state that the uncontroverted evidence appearing in the record shows that if this case shall be reversed, the net loss which they will have sustained by the enforcement of the Commission's order will amount to $16,000 per month, or $500 per day, with no possibility of recoupment; that this money will go, not to the shipping public represented by complainants

before the Commission, but to appellants' competitors, The Tennessee Central Railroad Company and its connections, none of which were complainants; and that practically the only benefit which will accrue to the interested public at Nashville (the shippers whose industries are located upon appellants' tracks) will be relief from the slight additional expense and inconvenience incident to draying in the very rare and exceptional instances where an inbound car, destined for an industry on appellants' terminal tracks, is accidentally misrouted and comes in over the Tennessee Central instead of over appellants' lines—an occurrence which according to the evidence does not ordinarily happen one time in a thousand.

Appellants further show that, in addition to the above financial loss, a change of the switching practices at Nashville will necessitate the expensive publication throughout the country of new tariffs showing such change, and if the case be reversed, the re-publication of the present tariffs will cause additional expense and great confusion, uncertainty and inconvenience to all other railroads and to all shippers.

As to the merits, appellants state briefly that the single question involved in this appeal is whether or not the facts concerning appellants' switching arrangements at Nashville (which are undisputed and are set out in detail in the court's opinion) constitute as a matter of law, a switching for each other, and hence a facility which, under Section 3 of the Act to Regulate Commerce requiring the furnishing of equal facilities, must be furnished to the Tennessee Central Railroad Company.

"Switching" by one railroad for another, as the term is used in this and similar cases that have come before the Commission and the courts, is the movement of a car of freight between an industry on the terminal tracks of one railroad and the point of interchange with another railroad. Whether it be an outbound car moving from the industry to the point of interchange with the other railroad, or an inbound car moving from the said point of interchange to the industry, *the movement is performed by the engine and crew of the company upon whose tracks the industry is located,* and that company is said to switch for the other.

By the term competitive freight traffic (which the Commission's order requires appellants to switch for the Tennessee Central Railroad Company, because, as it declares, they switch such traffic for each other) is meant freight cars which move to or from industries located upon appellants' terminal tracks at Nashville when the point of origin or of destination can be reached by one or both of appellants and also by the Tennessee Central Railroad, or its connections—and at the same rate. Such cars the appellants decline to switch between the industries on their tracks and the point of interchange with the Tennessee Central Railroad, because thus to give the Tennessee Central access to the appellants' terminals turns over to that company and its connections the line-haul revenue on such shipments as it can successfully solicit, and requires appellants, for a mere switching charge, to handle cars to and from industries on their tracks when they also are ready and able at the same

rate, and hence are entitled, to perform the remunerative transportation haul.

It is conceded by appellants that if they do switch for each other, in the meaning of that expression as used by this and other courts in analogous cases, it is a discrimination not to switch for the Tennessee Central Railroad Company, but they state that they do not switch for each other, and that there is no evidence in the record in support of the contention that they do.

They state that there is no conflict in the evidence as to the facts and circumstances bearing upon the relation of the two appellant companies and their terminal practices at Nashville, all of which are fully and correctly set out in the court's opinion (Rec., Vol. I, pp. 61-69) so as to require no further reference to the record; but they aver that these facts and conditions do not as a matter of law constitute a switching facility which they must give to another railroad or else be guilty of discrimination. The facts, very briefly summarized, are these:

As early as 1872, when the two companies were entirely independent of each other, some of the terminal tracks were used jointly under a contract providing for perpetual joint use. Subsequently, after the Louisville & Nashville Railroad Company had acquired a majority of the stock of the Nashville, Chattanooga & St. Louis Railway, the two companies procured the organization of a holding company, known as the Louisville & Nashville Terminal Company, and through it acquired and constructed jointly, at a cost of several million dollars, the

principal terminal yards, including the Union Station and adjacent tracks. Then in 1900, and before the Tennessee Central Railroad was built to Nashville, appellants solely for the sake of economy and their mutual convenience in enjoying these terminals which they owned jointly, entered into a contract for the joint operation of these joint terminals, which under this agreement were enlarged so as to comprise not only said principal terminals (which they held jointly under a 99-year lease) but also their individually owned tracks within the switching limits of Nashville, each thereby obtaining equal rights with the other to these tracks. Under this contract the "Nashville Terminals," which is the agreed designation of appellants' own partnership or joint operating agency, takes charge of all incoming trains (passenger and freight) upon arrival, breaks them up, distributes the cars, incidentally places the local cars at the industries to which they are destined (but likewise handles all through cars), reverses the process as to outbound trains, freight and passenger, and does all other terminal services whatsoever including the operation of the Union Depot and its accessories. The expenses are shared for the most part upon a wheelage basis, that is, in proportion to the number of cars handled for each, so that in fact, as well as in law, the cars switched to the various industries upon their jointly possessed tracks are not switched by either for the other, but each company, in effect, does its own switching at its own expense and without the payment of any switching charge by one to the other, or by a shipper to either; yet, solely because of this arrangement, the

lower court upheld the Commission's order requiring these companies to do an entirely different thing for the Tennessee Central Railroad Company, namely, to handle the cars coming or going over that road between the point of interchange and industries on their tracks, though the Tennessee Central had no interest in said tracks or in the equipment and train crews with which said cars were handled.

Besides its interest to the parties, this case is one of great general importance to the railroads of the country, for the plan here followed is the one under which railway companies, for the sake of economy and convenience, conduct union stations and operate joint terminal facilities in many cities; and their right so to do, without being required on that account to share the benefit of their terminals with nonparticipating companies, is as much involved in the decision of this case as are the rights of these appellants.

Wherefore, the premises considered, appellants pray that the court sustain this their motion for an order continuing, until this appeal is decided, the lower court's suspension of the Interstate Commerce Commission's order here involved.

H. L. Stone,
W. A. Colston,
Claude Waller,
Edward S. Jouett,
Solicitors for Appellants.

The following notice of the filing of the attached petition and motion has been accepted by counsel for the appellees:

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF TENNESSEE, NASHVILLE DIVISION.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, ET AL., - - - - - - - - - *Plaintiffs,*

versus

UNITED STATES OF AMERICA, ET AL., - - *Defendants.*

NOTICE.

The defendants will take notice that, on Monday November 15, 1915, the plaintiffs, pursuant to the third paragraph of the final decree entered herein, on October 22, 1915, will perfect their appeal of this suit to the United States Supreme Court by filing the duly certified record thereof with the clerk of said court and will thereafter, on the same day about the hour of 12:00 o'clock, noon, present to said court at its court-room in Washington, D. C., their petition and motion for the suspension, pending said appeal, of the Interstate Commerce Commission order involved herein.

This November 12, 1915.

H. L. STONE,
W. A. COLSTON,
CLAUDE WALLER,
EDWARD S. JOUETT,
Solicitors for Plaintiffs.

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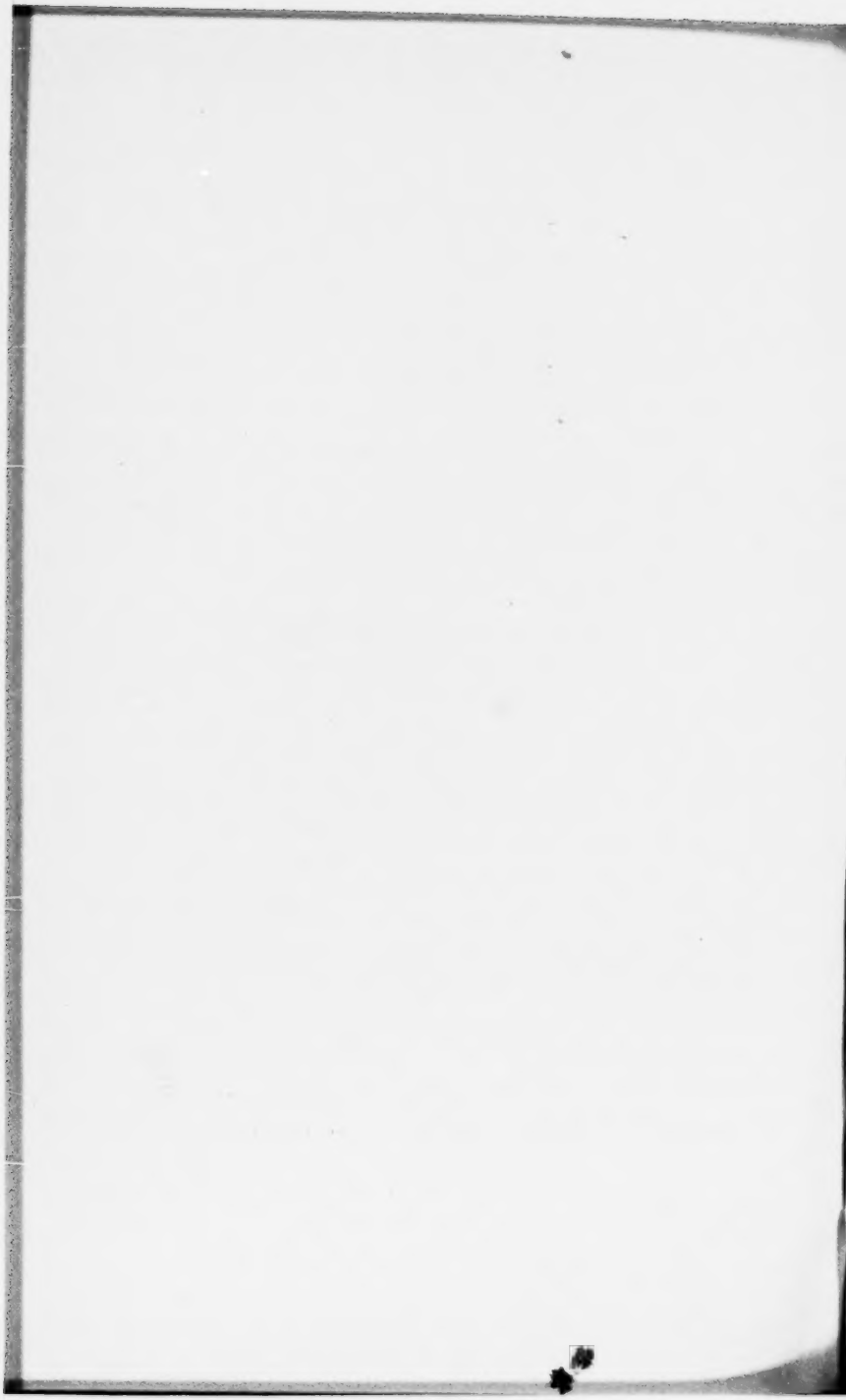


SUPREME COURT OF THE UNITED STATES

LOUISVILLE & NASHVILLE RAILROAD COMPANY,
ET AL., - - - - - - - - - - *Appellants,*

versus

UNITED STATES OF AMERICA, ET AL., - - *Appellees.*

BRIEF OF APPELLANTS ON MOTION TO MAINTAIN THE *STATUS QUO* PENDING THE APPEAL.

This motion for an order suspending the operative effect of the Interstate Commerce Commission's order, pending this appeal, comes to this court under circumstances which are exceptional and peculiarly favorable to the granting of such relief. This is true because the trial court, with a perfect knowledge of the case in all its details, was called upon to consider a motion identical with this one, and it expressly held that this was a case where, notwithstanding its dismissal of the bill, a suspension pending appeal ought to be granted, and this conclusion it supported by definite findings of fact which we submit should be equally persuasive with this court. Among them are these:

NOTE—Italics are ours.

> "That in the event the decree of this court denying the injunction prayed by the petitioners and dismissing their bill should be reversed by the Supreme Court, *a great and irreparable injury would in the meantime have resulted to the petitioners by reason of the diversion of part of their traffic* entering and leaving Nashville by competing railroads enabled to obtain access to local industries on their lines through the enforcement of the order of the Interstate Commerce Commission, and *the expense and disturbance of their business* caused by changing their former practices in the meantime so as to comply with the order of the Commission and the publication of new tariffs." (Rec., Vol. I, p. 79.)

and that

> "on the other hand, it does not clearly appear that any particular individuals would suffer material financial injury in the event the order of the Commission is stayed for a short time so as to enable the petitioners to perfect their appeal and to present to the Supreme Court an application for a preliminary suspension of the Commission's order pending the hearing of the appeal in the Supreme Court, in accordance with the practice recognized in Omaha Street Railway v. Interstate Commission, 222 U. S. 582, 583." (Rec., Vol. I, p. 79.)

The court thereupon modified its original proposed decree and temporarily suspended the Commission's

order until the appeal could be perfected and application made here for a stay lasting throughout the pending of the appeal. This, it held, was done,

> "in view of *the importance of the questions involved in this cause,* and *the irreparable injury which will result to the petitioners from the enforcement of the decree in this cause, if reversed.*" (Rec., Vol. I, pp. 79, 80.)

I.

The Court's Power to Grant this Relief.

We assume that counsel for appellees will not question either the power of this court to take jurisdiction of this motion, or the propriety of its doing so, since it was their contention in the argument before the lower court that the Supreme Court alone, and not the trial court, had jurisdiction of such a motion. In support of such contention they read and urged upon the court's consideration the case of Omaha Street Railway v. Interstate Commerce Commission, 222 U. S. 582. In that case, where the validity of an order of the Interstate Commerce Commission was attacked, this court, citing authorities, specifically held that it had the power to, and it did, suspend the Commission's order pending an appeal, though there, as here, the lower court had denied an injunction and dismissed the bill. It was upon the strength of this authority, specifically cited by the lower court, (Vol. I, p. 79) that the latter confined its order of suspension to such a period as would enable appellants to perfect their

appeal and make application to this court for the further suspension during its pendency.

But it may be suggested that this court is loath to consider applications of this sort because of the time involved in their hearing; and we are not unaware of the statement of the court in Leonard v. Ozark Land Co., 115 U. S. 465, 468, a somewhat similar case, that to avoid such practice becoming prevalent this court in 1878 promulgated Equity Rule 93 (New Number 74).

It will be noted, however, that according to the letter of that rule it does not quite cover our case. It reads as follows:

> "When an appeal from a final decree in an equity suit granting or dissolving an injunction is allowed by a justice or a judge who took part in the decision of the cause, he may, in his discretion, at the time of such allowance, make an order suspending, modifying or restoring the injunction during the pendency of the appeal upon such terms, as to bond or otherwise, as he may consider proper for the security of the rights of the opposite party."

While application was made in this suit for an interlocutory injunction and a temporary restraining order, neither was in fact issued because, at the conclusion of the hearing upon plaintiff's motion therefor and upon defendant's motion to dismiss, the Interstate Commerce Commission, at the suggestion of the court, extended the effective date of its order here involved until a time after the decision of the court, though the court's

decision denying the injunction and dismissing the bill was not rendered until four months after the hearing.

Under these circumstances it was manifestly unsafe to wait until an appeal should be taken and then rely upon applying to the lower court for a stay order upon the claim that the *spirit* of Rule 74 entitled us to it because, though no formal injunction had ever been issued, a sort of voluntary one had been in effect. We should undoubtedly have been met with the contention that the lower court was confined to the *letter* of this rule, and had no power to grant a suspension where no injunction had in fact been issued. We did, therefore, all that could be done when we applied to the trial court for the suspension as a part of its final decree. It was our view that the trial court's suspension could have been made to apply during the entire pendency of the appeal, but, evidently because of the argument of defendant's counsel that under the authority of the Omaha Street R'y case, *supra,* the Supreme Court should be permitted to determine this question for itself since it had cognizance of the appeal, the lower court confined its stay order to such period as would allow this court to consider it and extend it throughout the appeal if it saw fit so to do.

We respectfully submit, then, that whatever may be the policy of the court in the matter of preferring not to take cognizance of applications for suspensions where the parties might have proceeded in the lower court under Equity Rule 74, such rule of policy does not apply here because this is not such a case.

Considering, then, that under the doctrine of the Omaha case this court has full power to maintain the *status quo* pending appeal, and that there is no established rule or policy against its taking cognizance of the motion, there remains the naked question whether the suspension should be granted.

II.

Precedents for Maintaining Status.

That the existing status be maintained, where practicable, pending an appeal is the underlying principle of the familiar doctrine of supersedeas, one of the cardinal features of appellate procedure. And where not to maintain such status might work great or irreparable injury this court and other Federal courts have time and again held that the power ought to be exercised.

A reference to some of the principal cases where the Federal courts have discussed the relief we are here seeking may be helpful.

A leading one is *Hovey* v. *McDonald,* 109 U. S. 150, where a certain fund, to which there were various adverse claimants, was placed in the hands of the receiver of the court. Upon final decree, the receiver was directed to pay the fund to the successful claimant. Meantime his adversary took an appeal, but, before a bond was executed, the receiver, acting under the verbal directions of the court to follow the decree, paid over the fund. The case was reversed, whereupon an attempt was made to hold the receiver personally liable for his

action in paying to the other party. The lower court refused to do this and the Supreme Court, in the second appeal, entitled as above, was called upon to review the lower court's action. The Supreme Court this time affirmed the case, holding that the receiver's action was proper since the mere taking of an appeal did not in itself operate as a suspension of the power of the court below to enforce its decree; but the question as to whether the lower court could have preserved the *status quo* by an order, if it had chosen to do so, arose and was considered. It was held that neither the dissolution of the injunction nor the *dismissal of the bill on its merits* affected the right of the lower court, if it saw fit to do so, to preserve the *status quo.*

In considering the *Slaughter House cases,* 10 Wall. 273, which held that an appeal or a writ of error did not nullify the order of the lower court, granting or dissolving the injunction, the court (in *Hovey* v. *McDonald*), speaking of the Slaughter House cases, said:

> "It was decided that neither a decree for an injunction nor a decree dissolving an injunction was suspended in its effect by the writ of error, though all the requisites for a supersedeas were complied with. *It was not decided* that the court below had no power, if the purposes of justice required it, *to order a continuance of the status quo* until a decision should be made by the Appellate Court, or until that court should order the contrary. This power undoubtedly exists, and *should always be exercised when any irremediable injury may result from the*

> *effect of the decree as rendered;* but it is a discretionary power, and its exercise or non-exercise is not an appealable matter."

This court's opinion that, notwithstanding the dissolution of the injunction and *the dismissal of the bill,* the lower court there *ought to have preserved the status,* is thus stated:

> "Applying these principles to the present case, it is clear that the force of the decree was not affected by the appeal, although it was in the power of the special term to have continued the injunction and to have retained the fund in its control in the hands of the receiver had it seen fit to do so. Judging only from what appears in the record, we can not refrain from saying that, in this case, *the latter course would have been eminently proper.* It would have protected all parties and produced injury to none."

A pertinent precedent, which was approved by this court, is found in *Cotting* v. *Kansas City Stock Yards Co.,* 82 Fed. 839, where was involved the validity of a statute of the State of Kansas prescribing certain maximum charges for services in the yarding, feeding and watering of live stock. The company insisted that the Kansas statute was void, both because the rates prescribed were too low, and because they did not apply to other stock yards, which did a similar business, though less in volume. A temporary restraining order was issued, but upon the hearing of the application for an in-

terlocutory injunction the Circuit Court *revoked the temporary restraining order and denied the application for a temporary injunction.* This was on October 4, 1887. The case was then prepared for a final hearing. By stipulation of the parties the pleadings were at once made up and the case was submitted upon its merits upon the proof taken on the motion for an interlocutory injunction. On October 28, 1897 (twenty-four days later), the court, in an opinion by Circuit Judge Thayer, *dismissed the bill.* In the opinion, and also in the final decree, was the following provision, which necessarily preceded an application under Rule 74, as that can come only after an appeal is allowed:

> "The great importance of the questions involved in these cases will doubtless occasion an appeal to the Supreme Court of the United States, where they will be finally settled and determined. If, on such appeal, the Kansas statute complained of should be adjudged invalid for any reason, and in the meantime the statutory schedule of rates should be enforced, the stock yards company would sustain *a great and irreparable loss.* Under such circumstances, as was said, in substance, by the Supreme Court in Hovey v. McDonald, 109 U. S. 150, 161, 3 Sup. Ct. 136, *it is the right and duty* of the trial court to maintain, if possible, the *status quo* pending an appeal, if the questions at issue are involved in doubt; and Equity Rule 93 was enacted in recognition of that right. The court is of opinion that the cases at bar are of such

moment, and the questions at issue so balanced with doubt, as to *justify and require an exercise of the power in question.*"

It accordingly, in the same final decree that dismissed the bill, stayed the operation of the Kansas statute provided within ten days an appeal was taken and a bond executed.

This case went to the Supreme Court and is reported in 183 U. S. 79. In the statement of the case Mr. Justice Brewer set out in full, with evident approval—at least with no indication of disapproval—the above quoted passage. The Supreme Court held that the statute in question was in fact void and reversed the finding of the lower court, thus demonstrating the propriety and justice of Judge Thayer's action in maintaining the *status quo*, pending the appeal. It will be noted that in the present case the appellants, in addition to the ordinary appeal bond, were required to and did give a special bond in the sum of $25,000 which protects all interested parties if this preliminary application for a suspension is not granted, and if it is, then it further protects them if the appeal itself should be dismissed or the case affirmed.

This question was also considered in *Louisville & Nashville Railroad Co.* v. *Siler*, 186 Fed., at page 203. That was a suit to enjoin the enforcement by the Kentucky Railroad Commission of certain rates claimed by the railroad company to be legal. The case came up on motion for preliminary injunction, which was denied by the court, but, in order to preserve the rights of the par-

ties in the event the court should be in error, the restraining order, issued at the outset of the case, was continued in force until the case could be reviewed by appeal—and, as in the Cotting case, this was done before the appeal was taken and hence not under Rule 93. Here the court said:

> "It follows that the motion for an interlocutory injunction in both its branches must be denied. However, the questions involved are of such importance that we assume that a review of our conclusions will be desired by complainant, pursuant to the special provision for such review found in Section 17 of the Act of June 18, 1910. If the Supreme Court, on such review, shall decide that complainant was entitled to this injunction, then it is apparent that our present refusal to grant the injunction *would result in irremediable injury, on account of failure to preserve the status quo.* Applying the reasons of the rule stated in Hovey v. McDonald, 109 U. S. 150, 161, 3 Sup. Ct. 136, 27 L. Ed. 888, and further stated in Cotting v. Kansas City Stock Yards Co., *supra*, 183 U. S. 79, 80, 22 Sup. Ct. 30, 46 L. Ed. 92, we have concluded that the restraining order of September 7, 1910, should be continued until an opportunity has been given for the complainant to secure a review, and subject to conditions which will be prescribed in the order to be entered."

The principal case, however, where the existing status has been maintained by suspending an order of the In-

terstate Commerce Commission, and that by the Supreme Court itself, is Omaha Street Railway v. Interstate Commerce Commission, 222 U. S. 582. There the Commerce Court sustained the Commission's order and dismissed the railway company's bill, as in our case, but this court without any such assistance from the trial court concerning the facts as is presented in this record, maintained the *status quo* until it could decide the appeal on its merits, saying:

> "Upon the authority of Revised Statutes, Section 716; *Ex parte Milwaukee Railroad Co.*, 5 Wall. 188; *Leonard* v. *Ozark Co.*, 115 T. S. 465, 468; *In re Classen*, 140 U. S. 200, 207; *In re McKenzie*, 180 U. S. 536, 549; *United States* v. *Shipp*, 203 U. S. 563, 573; and upon full consideration of the facts bearing upon the propriety of the appellants' motion for an order to maintain the *status quo* pending this appeal, it is ordered that the enforcement of the order of the Interstate Commerce Commission entered November 27, 1909, and drawn in question in this case, be, and it is, suspended and enjoined during the pendency of this appeal, upon condition that within ten days herefrom the appellants execute unto the Interstate Commerce Commission and file in this cause a good and sufficient bond in the sum of $10,000, with sureties to be approved by the clerk of this court, and conditioned that the appellants will promptly pay any and all damages which may be suffered by their several passengers and intended

passengers by reason of the granting or continuance of this order, if it is adjudged ultimately that the order of the Interstate Commerce Commission, drawn in question in this case, is a valid one."

In the argument before the lower court counsel for appellees contended that an order of the Interstate Commerce Commission was not subject to the powers of a court of equity quite to the same extent as other things which the maintenance of an existing status might affect; but we assume that, in view of the court's action in the Omaha case, no such limitation upon the powers of this court will be claimed.

Here it is manifest that the lower court reached the definite conclusion that the suspension of this order was proper and necessary. Whether it had the power to suspend it throughout the time of the appeal or not is immaterial. It went as far as it thought proper in view of this court's conceded power over the same matter. The appellants did all they could. We submit then, that whatever may be the disinclination of this court under ordinary circumstances covering motions of this sort, the interests of justice require that in this case the obvious purpose and desire of the lower court should be carried to completion.

We do not, however, rely alone on the lower court's having reached the conclusion that the facts justify and require this suspension of the Commission's order. On the contrary, if the court is so inclined, we invite its most diligent independent study of the record. In aid of this we shall call attention to what the record

shows, without dispute, as to the enormous and irremediable loss which appellants will sustain, if the case should be reversed, and also will refer briefly to the merits of the case as bearing upon the question of doubt concerning the correctness of the lower court's decision.

III.

The Great and Irreparable Loss of $16,000 Per Month.

Whether the court will maintain the existing status, pending an appeal, must depend upon the circumstances of each case. Being in the nature of a preliminary injunction certain principles established by repeated adjudication apply. One of these is the doctrine of "comparative hardship or convenience to the respective parties" (132 Fed. 475). The general rule is thus stated by this court in Russell v. Farley, 105 U. S. 433, 438:

> "It is a settled rule of the Court of Chancery, in acting on applications for injunctions, to regard the comparative injury which would be sustained by the defendant, if an injunction were granted, and by the complainant, if it were refused. Kerr on Injunctions, 209, 210. And if the legal right is doubtful, either in point of law or of fact, the court is always reluctant to take a course which may result in material injury to either party."

As applied to *injunctions pending an appeal*, we have quoted this court's statement of the rule as given in *Hovey* v. *McDonald, supra*, that the power "*should al-*

ways be exercised when any irremediable injury may result from the effect of the decree as rendered."

We respectfully insist that the uncontroverted facts proved in this case show that, if this court shall differ from the lower court upon the single question of law here involved (for it is a question of law applicable to facts which are not disputed), the railroad companies will suffer a wholly irremediable loss of $16,000 per month, or more, unless this suspension be granted; whereas if it is granted and the case shall be affirmed, the damage suffered by the shipping public, represented by the original complainants, will be negligible; yet, for what little there is, full compensation will be secured by the bond for $25,000.

In his affidavit (Rec., Vol. I, pp. 39-49), filed on the hearing of plaintiff's motion for an interlocutory injunction, Mr. A. R. Smith, Third Vice-President of the Louisville & Nashville Railroad Company, and the head of its Traffic Department, testified that the net actual loss to the Louisville & Nashville Railroad Co. incident to opening these terminals to the Tennessee Central for competitive business would be $106,480 per annum.

The affidavit in detail sets forth intelligently and convincingly the facts and the reasoning upon which he arrived at that figure. It was not controverted nor questioned.

Mr. Charles Barham, the General Freight Agent of the Nashville, Chattanooga & St. Louis Railway, in a similar affidavit (Rec., Vol I, pp. 50-56) shows that the net loss of that company will be $84,150. The combined

loss to appellants is $192,530 per annum, which is more than $16,000 per month and over $500 per day.

Assuming that the hearing of this appeal can be especially expedited it is hardly possible that the loss of the two companies can be less than $100,000 by the time it is decided; and there is no possible theory upon which any of it can be recovered if the case shall be reversed.

In addition to this financial loss, there would be involved material expense to appellants and great confusion and inconvenience to all railroads and shippers throughout the country that do business with Nashville if new tariffs, now ordered to be put in, should, upon reversal by the Supreme Court, be set aside and the old system be uncontroverted.

C. C. Gebhard, Chief Clerk of the Traffic Department, of the Louisville & Nashville Railroad Company in his affidavit, filed upon the original motion for a temporary restraining order, thus describes the nature of the necessary advertisement of the new tariff and states the number of persons to whom it must be distributed:

> "He says that in order to make legal publication of said tariffs it will be necessary for the Louisville & Nashville Railroad Company and the Nashville, Chattanooga & St. Louis Railway to distribute them to all of their local freight agents, general division and soliciting representatives, as well as to connecting lines throughout the country generally, and that he has made investigation of the lists of persons to whom these distributions will have to be made, and

he says that such lists include approximately 1,900 persons." (Rec., Vol. I, p. 57.)

But what of the loss to the public caused by the suspension, if this court also should hold that the two roads are switching for each other and hence should switch for the Tennessee Central? We cheerfully answer this question.

It must be borne in mind that the only shippers interested are those whose industries are located upon the tracks of the Louisville & Nashville and the Nashville, Chattanooga & St. Louis, and that this proceeding does not relate to the non-competitive cars, for they are already freely switched.

It applies, then, only to the movement, between those industries and the point of interchange with the Tennessee Central, of cars which are to go out or come in over the Tennessee Central to points of destination, or from points of origin, which the L. & N. or N., C. & St. L. can reach *at the same or a less rate*. It is thus apparent that the shipper ordinarily need suffer no financial loss, for he can ship out or in over one of these two latter lines (upon which his industry is located) at the same rate as over the Tennessee Central's, and, according to the evidence, can get equally as good, if not better, service.

Practically his only actual injury, then, arises in the case of the occasional inbound misrouted car, which by mistake comes in over the Tennessee Central instead of the road upon whose tracks the industry is located. In a case of this sort the contents of the car are drayed to

his industry, but even this rare occurrence does not ordinarily entail a financial loss, since the Tennessee Central, and not the consignee, pays the drayage charge, except where he made the mistake as to routing—a thing which practically never occurs.

In support of the above general statement of the situation, we call brief attention to the finding of the Commission itself, and to the testimony offered by the complainants themselves upon the hearing.

The Commission in its report says:

> "The virtually prohibitive charges imposed by defendants for switching competitive Tennessee Central traffic at Nashville cause Nashville shippers *little direct pecuniary loss.* Industries located on any of the three lines can avoid the switching charges imposed by the others by shipping over the line on which they are located."

There was a suggestion of possible, but largely speculative, disadvantage and inconvenience in connection with car shortages, consignors' preference of lines and milling-in-transit privileges, but even such imaginary cases were possible only in extremely few instances in comparison with the general volume of traffic.

As to the cases of misrouting, which alone furnish possible occasion for tangible monetary loss, we submit that the general statement of the Commission that "shipments are frequently misrouted" is misleading and not supported by the evidence if the word "frequently" is to be given its usual meaning, for the proof overwhelm-

ingly shows that, speaking relatively, instances of misrouting are extremely rare, and when they do occur, the cost of drayage is paid by the railroad where the misrouting is its fault.

Reference to certain illustrative testimony on this question may not be amiss—all of it from witnesses introduced by the Traffic Bureau of Nashville.

C. J. Bonner, furniture manufacturer, testified on direct examination that the existing switching rules had caused drayage or switching loss "a few times." (Rec., Vol. II, p. 67.) On cross-examination, he admitted that during a period of ten or eleven years, in which his shipments amounted to 2,400 cars, he only knew of two instances when this had occurred.

E. S. Morgan, a merchandise broker, testified (Rec., Vol. II, p. 95) that during a period of seven years, where the shipments aggregated from 4,900 to 5,600 cars, there were only five instances where he suffered loss on account of drayage, and it appears that of those instances only one or two of them were chargeable to the switching rules.

R. H. McClellan, a grain merchant, testified (Rec., Vol. II, p. 125) to suffering occasional slight inconvenience, but stated that in a period of eight years, involving the handling of 12,000 cars, he had had no material trouble with the switching rules.

Practically the same admissions were obtained on the cross-examination of the other witnesses.

IV.

The Merits.

While not directly involved in the hearing of this motion it is not irrelevant to here add to the allegations of the motion at least a statement of the issue. It is proper first to state in explanation of the large record that the reasonableness of the switching charge for non-competitive freight, and divers other questions of more or less moment, were involved in the trial below, but all of these questions are eliminated upon this appeal except the single one of discrimination, for the lower court rested its decision solely on that ground. See the assignment of errors (Rec., Vol. I, p. 84).

We are familiar with this court's holding in various cases that the courts will not review the Commission's findings of fact, and that this applies to the fact of discrimination as well as of the reasonableness of a rate, but this rule does not cover a case where the facts are undisputed and yet the conclusion therefrom involves an error of law. The trial court in its opinion (Rec., Vol. I, p. 61) concedes that "a conclusion which plainly involves, under the undisputed facts, an error of law" is reviewable by the courts.

Here, as stated, the facts are undisputed, and it is practically needless to go beyond the court's opinion to get all of them. The lower court and the Commission

found that these facts constitute a switching by one of the appellants for the other—a facility which each must also furnish to the Tennessee Central. We insist that as the two roads had actually in 1896 jointly acquired, under a 99-year lease from the holding company, the union station and principal terminal facilities, paying therefor nearly three million dollars; and as they in 1900, before the Tennessee Central came to Nashville, had by contract exchanged trackage rights over their individually owned terminal tracks outside of the jointly owned yards (a thing necessary to the proper enjoyment of the union station and other central jointly owned facilities, because the principal yards were located there), they had a perfect right, without opening the terminals to other roads, to operate those joint terminals, either separately or jointly.

They elected, as a matter of convenience (to prevent unnecessary interference of their switch engines and trains) and as a matter of economy, to jointly employ the superintendent, train crews, etc., and operate them jointly under a contract whereby at the end of the month each pays to the joint agency as nearly as possible the actual cost of the service it received. Solely because of this arrangement the Commission and court say that they are switching for each other, and hence must switch the competitive cars of the Tennessee Central over their terminals.

It means that they must with their own engines and crews handle the Tennessee Central's car over their ter-

minals to and from industries on their tracks for a switching charge, notwithstanding the fact that neither performs any such service for the other, for in the case of their switching one does not handle the other's car, and the car of one does not pass over the other's tracks. Each owns an interest in the tracks equal to the other's; each is equally, or rather proportionately, interested in the agency used to operate the trains, and neither pays a switching charge, or anything else, to the other, but each pays to its own agency the actual cost of its own service.

The surrounding circumstances and conditions are not only not similar, as they must be to support the Commission's theory that Section 3 of the Act requiring the furnishing of equal facilities applies, but they are totally different—a proposition which seems reasonably patent, but which we shall debate more fully in our brief upon the merits of the appeal.

We will call attention to one other matter lest it create an incorrect impression. It is the case of Louisville & Nashville Railroad Co. v. United States, 238 U. S. 1, which affirmed the District Court (216 Fed. 672), which in turn had upheld the Commission's order (28 I. C. 533):

That case furnishes no precedent for this one, because the case there decided was entirely different from the one here presented. That case for the most part related to the rates on coal, but one branch concerned the practice of the carriers at Nashville with reference *to switching coal*. The evidence before the Commission relating to

the conditions at Nashville was not nearly so full as in this case, and the Commission, in its report, specifically found that the L. & N. and the N., C. & St. L. operated their individually owned tracks *independently of each other and switched for each other*, saying:

> "Both the Louisville & Nashville and the Nashville, Chattanooga & St. Louis have *individually owned tracks* which they *operate independently each of the other or of the Terminal Company*, and upon these tracks industries are located. To and from these industries as well as to and from those on the rails of the Terminal Company traffic of all kinds is *freely interswitched by the Louisville & Nashville and the Nashville, Chattanooga & St. Louis.*"

The inaccuracy of the above statements is clearly and indisputably shown in this record.

When the case was taken to the District Court for review *the transcript of evidence taken before the Commission was not introduced*, so the lower court and this court were confined, *as to the facts*, to the *finding of the Commission.*

The discussion of the switching question, which was manifestly a subordinate issue in the case, will be found in the latter part of the lower court's opinion.

In setting out the *facts* that court showed clearly that it understood that the two railroads were *independently operating their individually owned tracks* and that they

were *actually switching cars for each other.* For example, the opinion states (italics ours):

> "That both the Louisville & Nashville Railroad and the Nashville & Chattanooga Railway also individually own tracks *which they operate independently of each other or of the Terminal Company,* and upon which industries are located; that traffic of all kinds *is freely interchanged by the Louisville & Nashville Railroad and Nashville & Chattanooga Railway to and from these industries* as well as to and from those on the rails of the Terminal Company; that the tariffs of the Louisville & Nashville Railroad and the Nashville & Chattanooga Railway provide that no charge will be made for *switching between their respective lines at Nashville,* the expense of this service presumably being absorbed by the line bringing in the traffic."

This is further shown by the court's discussion of the effect of the Commission's order, the court saying:

> "Obviously its only effect is to require the petitioners to receive cars of coal from the Tennessee Central Railroad at junction points and to switch and deliver the same to industries along their respective lines, *in like manner as they receive such cars from one another and switch and deliver the same,* upon a just, reasonable and non-prohibitive switching charge, which they may themselves estab-

lish, *but which shall be the same as they shall respectively make to one another.*"

With this *wholly erroneous view of the facts,* the courts, lower and appellate, very naturally held that as the two roads were switching for each other they should be required to switch for the Tennessee Central.

In the light of the difference between the two cases presented to this court, we take it that it will not be seriously urged that the opinion in the Nashville Coal Case affords any aid in determining whether or not, as a fact, *according to the evidence which now for the first time is before the court,* the two railroads in question switch competitive traffic for each other, and, therefore, are guilty of discrimination in declining to switch like cars for the Tennessee Central.

This arrangement for the joint acquisition, construction, maintenance and operation of terminals, was made in good faith and at vast cost before the Tennessee Central Railroad (the only other railroad in Nashville) was built.

The question involved in this case—whether the two constituent companies must at disastrous loss "unscramble" their great terminal property or share it with a competitor for a nominal switching charge—is one of great and general importance, and it would seem to be at least so doubtful as to justify this court in maintaining the existing status until the case can be heard upon its merits, especially since the lower court, with

full knowledge of all the facts, has expressly held that the facts require such relief.

Respectfully submitted,

EDWARD S. JOUETT,
Solicitor for Appellants.

H. L. STONE,
W. A. COLSTON,
CLAUDE WALLER,
Of Counsel.

No. [redacted]290

In the Supreme Court of the United States.

OCTOBER TERM, 1915.

LOUISVILLE & NASHVILLE RAILROAD COMPANY ET AL., APPELLANTS,

v.

UNITED STATES OF AMERICA ET AL., APPELLEES.

SUGGESTIONS IN OPPOSITION TO AN APPLICATION FOR SUSPENSION OF AN ORDER OF THE INTERSTATE COMMERCE COMMISSION.

JOSEPH W. FOLK,
EDWARD W. HINES,
Counsel for Interstate Commerce Commission.

WASHINGTON : GOVERNMENT PRINTING OFFICE : 1915

SYNOPSIS AND INDEX.

15301—15——1

TABLE OF CASES.

In the Supreme Court of the United States.

OCTOBER TERM, 1915.

LOUISVILLE & NASHVILLE RAILROAD COMPANY et al., appellants,
v.
UNITED STATES OF AMERICA ET AL., APPELLEES. | No. 711.

SUGGESTIONS IN OPPOSITION TO AN APPLICATION FOR SUSPENSION OF AN ORDER OF THE INTERSTATE COMMERCE COMMISSION.

The complaint under which the order here attacked was made by the Interstate Commerce Commission was filed by the city of Nashville and the Nashville Traffic Bureau against the Louisville & Nashville Railroad Co., the Nashville, Chattanooga & St. Louis Railway, and the Louisville & Nashville Terminal Co. The Tennessee Central Railroad Co. and its receivers and the Nashville Terminal Co. were made defendants. As the Louisville & Nashville Terminal Co. is merely a nominal party, the word "appellants" as used in this brief refers to the L. & N. and the N., C. & St. L. alone. By the complaint filed with the Commission the rates, rules,

and practices of the carriers named as defendants affecting the interchange and switching of interstate traffic in the city of Nashville were attacked as unreasonable and unjustly discriminatory.

STATEMENT OF FACTS.

Prior to August 15, 1900, the Louisville & Nashville and Nashville, Chattanooga & St. Louis operated their respective terminals independently. Each road switched for the other at a charge of $2 per car, but on competitive traffic the switching charge was absorbed. Since August 15, 1900, all their terminal facilities, including the terminal buildings, tracks, and other facilities leased by them jointly from the Louisville & Nashville Terminal Co., except their individual team tracks and separate freight depots, have been maintained and operated jointly. The arrangement is called the "Nashville Terminals" and is managed by a board of three, composed of the general managers of the two roads and a superintendent of terminals. The total expense of maintenance and operation is apportioned monthly between the two roads on the basis of the total number of cars and locomotives of all kinds handled for each.

The Tennessee Central, which entered Nashville in 1901–2, after strong opposition from the Louisville & Nashville, leases its terminal facilities, consisting of a passenger station, freight depots, shops, main, side, and spur tracks, from the Nashville Terminal Co.

The appellants, through their unincorporated joint agent, the "Nashville Terminals," switch for the Tennessee Central any traffic for which neither of them competes at $3 per car, but traffic for which either of them competes they refuse to permit the "Nashville Terminals" to switch for the Tennessee Central except at prohibitive rates. The commission, after a full hearing, made an order requiring appellants to switch for the Tennessee Central both competitive and noncompetitive traffic on the same terms on which they switch such traffic for each other. The order also required the Tennessee Central to reciprocate and to desist from certain practices in the matter of the switching and interchange of interstate traffic, but that company is not complaining of the order of the Commission.

The motion for an interlocutory injunction and motions by the United States and the Interstate Commerce Commission to dismiss were heard by Circuit Judge Warrington and District Judges Sanford and McCall, and after full consideration those judges announced the conclusion that the motion for an interlocutory injunction should be denied and the petition dismissed. [Rec., vol. I, p. 59.] After the judges had filed their opinion, but before the decree was entered, the appellants made a motion for an injunction pending the appeal, and the judges inserted in their decree a provision staying the order of the Commission until this court should act upon a motion for such injunction, *provided* the appellants should perfect their appeal and present

their petition and motion to this court for the injunction within 30 days from the date of the decree, which they have done. Only two of the three judges concurred in this modification of the decree.

ARGUMENT.

Counsel for appellants state that the sole ground on which they attack the order of the Commission in this court is that the finding of the Commission that appellants switch for each other is an erroneous conclusion of law.

While this court has the inherent power to issue any writ necessary to the exercise of its jurisdiction, we insist that this is not a proper case for the exercise of that power.

I.

THE EXACT QUESTION INVOLVED UPON THIS APPEAL HAS BEEN DETERMINED BY THIS COURT.

In *Louisville & Nashville R. Co.* v. *United States*, 238 U. S. 1, this court had occasion to consider an order of the Interstate Commerce Commission requiring appellants to switch coal for the Tennessee Central at Nashville upon the same terms on which they switched coal for each other, and the court, referring to the reciprocal arrangement here involved, at page 18, said:

> Disregarding the complication arising out of joint ownership and the fact that each of the appellants switches for the other, it will be seen that the Commission is not dealing

> with an original proposition, but with a condition brought about by the appellants themselves. Under the provisions of the commerce act [24 Stat. 380] the reciprocal arrangement between the two appellants would not give them a right to discriminate against any person or "particular description of traffic."

But counsel for appellants say all the facts were not then before this court. If the facts were not before the court, it was the fault of appellants, who brought the case here upon the findings of the Commission without the evidence. The Commission in that case found that the appellants switched for each other without finding all the facts upon which that conclusion was based, and the appellants, choosing to accept that conclusion as correct, invoked the jurisdiction of this court to determine its legal effect. In that case this court commended the appellant for not making the evidence heard by the Commission a part of the record, but we may assume that in doing so the court did not anticipate that the failure to make that evidence a part of the record would later be used by the appellants as an excuse for reopening one of the questions presented in that case. Certainly, the appellants, having failed to avail themselves of the opportunity presented in that case to bring before the district court all the facts now presented, are not in a position to ask a suspension of the order of the Commission here involved pending the determination by

this court of the legal effect of facts, which they might have brought before this court in the former case. In that case this court, at page 10, said:

> The railroad companies did not offer all of the evidence which was considered by the Commission; and on this appeal they do not include in the record all of the hundreds of pages of testimony which had been submitted to the Commission; but—conceding that the evidence was conflicting and tended to support the findings of the Commission—they insist that the facts found were insufficient in law to sustain the orders which were made.

The appellants did, therefore, in that case concede that the evidence tended to support the finding of the Commission, which they quote on page 23 of their brief, and which they now say was incorrect, although, so far as appears, all the facts which now appear in this record appeared in the record before the Commission in that case.

II.

THE ORDER OF THE COMMISSION IS SUPPORTED BY SUBSTANTIAL EVIDENCE.

The ultimate finding of the Commission is the finding of unjust discrimination, and that finding, although based on undisputed evidence, is a finding of fact. *United States* v. *Louisville & Nashville R. Co.*, 235 U. S. 314, 320. The basis of that finding is the finding that appellants switch for each other, and that finding appellants insist is not supported

by substantial evidence. The question is a simple one. The appellants have pooled their terminals and have placed the operation of these terminals in the hands of their unincorporated joint agent, called "Nashville Terminals," which switches for each of them. The sole question is whether or not the appellants by this device can avoid the charge of unjust discrimination, which it is conceded would exist but for the creation of the joint agency. This question was answered in the negative by the Commission and by the judges below. The latter said [Rec., vol. I, p. 70]:

> That each railroad does not separately switch for the other, but that such switching operations are carried on jointly is not, in our opinion, material. If it were, all reciprocal switching operations carried on by two railroads at any connecting point of several carriers could be easily put beyond the reach of the act and its remedial purpose defeated by the simple device of employing a joint agency to do such reciprocal switching. The controlling test of the statute, however, lies in the nature of the work done rather than in the particular device employed or the names applied to those engaged in it.

The Commission had jurisdiction to determine the question, and three judges having found not merely that there was substantial evidence to support the conclusions of the Commission but that its conclusion was correct, there is a strong presumption in favor of the correctness of that conclusion, es-

hereby rescinded, abrogated and for nothing held from and after the date hereof.

SEVENTH. It is further understood and agreed that Article XII of said indenture of lease, dated June 15th, 1896, shall be modified, amended and changed to read as follows, to-wit: Said second parties do hereby, for themselves, and their respective successors and assigns, covenant with the said first party, its successors and assigns, that as rent for the premises or property, described in Article I of said indenture of lease, dated June 15th, 1896, and for rent for the improvements thereon, and for the purpose of reimbursing and making whole the said first party for the moneys expended by it in the improvements erected upon the parcels or tracts of land described in Article II and III of said indenture of lease, the said second parties, their respective successors and assigns, will pay the principal and interest of the bonds secured by the Fifty Year Four Per Cent. Gold First Mortgage for Three Millions Dollars ($3,000,000), executed by the Louisville & Nashville Terminal Company to the Manhattan Trust Company, Trustee, of New York, on the first day of December, 1902, and will pay the same to the holders thereof as said interest and principal become due. And the said second parties further, for themselves, and their respective successors and assigns, covenant with the said first party, its successors and assigns, to pay all taxes, rates, charges and assessments that may be levied or imposed, during the term aforesaid, on said premises or property, and on said improvements erected thereon.

And the said second parties do, for themselves, and their respective successors and assigns, further covenant with the said first party, its successors and assigns, that they will keep all of said improvements on said property in repair, and will insure the same for the full value thereof, in some reputable insurance company or companies, and as often as the property so insured shall be burned down or damaged by fire, such sum or sums of money which shall be recovered or received by said second parties, or their respective successors and assigns, for and in respect of said insurance, shall be laid out or expended by them in rebuilding or repairing such property so insured, or such parts thereof as shall be so destroyed by fire.

SEVENTH. It is further understood and agreed that Article XVI of said lease, dated June 15th, 1896, shall be changed, amended and modified to read as follows, to-wit: Said second parties do hereby, for them-

selves, and their respective successors and assigns, covenant with the said first party, its successors and assigns, that at the expiration of the term, or at an earlier termination, of this lease, said second parties, or their respective successors and assigns, shall and will, peaceably surrender and yield up to the said first party, its successors and assigns, the premises described in Article I, with their appurtenances.

EIGHTH. It is further understood and agreed that Article XVII of said indenture of lease, dated June 15th, 1896, shall be amended, modified and changed to read as follows, to-wit: Said second parties do hereby, for themselves, and their respective successors and assigns, covenant with the said first party, its successors and assigns, that in case of any breach or non-performance on the part of the said second parties, or their respective successors and assigns, of any of the covenants, provisos or conditions herein contained, or contained in said lease dated June 15th, 1896, which are not abrogated or cancelled by this instrument, it shall be lawful for said first party, its successors and assigns, at any time thereafter, into and upon the premises described in Article I of said lease, dated June 15th, 1896, or any part thereof, in the name of the whole, to re-enter and the same again repossess and enjoy, as of its or their former estate, anything hereinbefore contained to the contrary notwithstanding.

NINTH. It is further understood and agreed that all of the provisos and conditions contained in said indenture of lease, dated June 15th, 1896, which are not herein abrogated and cancelled, modified or altered, and which are not inconsistent with the provisions of this instrument, shall remain and continue in force for the unexpired term thereof.

IN WITNESS WHEREOF, the said parties hereto have caused these presents to be signed by their respective Presidents or Vice-Presidents, attested by their respective Secretaries or Assistant Secretaries, and their respective corporate seals to be hereunto affixed. Executed in triplicate originals the day and year first hereinbefore written.

LOUISVILLE & NASHVILLE TERMINAL COMPANY,
By E. C. LEWIS, President.

[L. & N. T. Co., SEAL.]

Attest:

W. H. BRUCE, Assistant Secretary.

LOUISVILLE & NASHVILLE RAILROAD COMPANY,
By WALKER D. HINES, First Vice-President.
[L. & N. R. R. Co., SEAL.]
Attest:
W. H. BRUCE, Assistant Secretary.

NASHVILLE, CHATTANOOGA & ST. LOUIS R'Y,
By J. W. THOMAS, President.
[N. C. & St. L. R'Y, SEAL.]
Attest:
J. H. AMBROSE, Secretary.

STATE of TENNESSEE,
County of Davidson.

Before me, E. B. DUVAL, a Notary Public in and for the State and County aforesaid, personally appeared E. C. Lewis, with whom I am personally acquainted, and who, upon oath, acknowledged himself to be the President of the Louisville & Nashville Terminal Company, the within named bargainor, a corporation, and that he as such President, being authorized so to do, executed the foregoing instrument for the purpose therein contained, by signing the name of the corporation by himself as President, and that he further acknowledged that the seal thereto affixed is the genuine corporate seal of the said Company, and that he caused the same to be duly attested by W. H. Bruce, the Assistant Secretary of said Company.

Wtiness my hand and seal at office in Nashville, Tennessee, this fifth day of December, 1902.

E. B. DUVAL, Notary Public.

STATE of KENTUCKY,
County of Jefferson.

Before me, G. W. B. OLMSTEAD, a Notary Public in and for the State and County aforesaid, personally appeared Walker D. Hines, with whom I am personally acquainted, and who, upon oath acknowledged himself to be the First Vice-President of the Louisville & Nashville Railroad Company, the within named bargainor, a corporation, and that he as such First Vice-President, being authorized to to do, executed the foregoing instrument for the purpose therein contained by signing the name of the corporation by himself, as First Vice-President, and that he further acknowledged that the seal thereto

affixed is the genuine corporate seal of the said Company, and that he caused the same to be duly attested by W. H. Bruce, the Assistant Secretary of said Company.

Witness my hand and seal at office in Louisville, Kentucky, this 6th day of December, 1902.

G. W. B. OLMSTEAD, Notary Public.

STATE of TENNESSEE,
County of Davidson.

Before me, E. B. DUVAL, a Notary Public in and for the State and County aforesaid, personally appeared J. W. Thomas, with whom I am personally acquainted, and who, upon oath, acknowledged himself to be the President of the Nashville, Chattanooga & St. Louis Railway, the within named bargainor, a corporation, and that he as such President, being authorized so to do, executed the foregoing instrument for the purpose therein contained, by signing the name of the corporation by himself as President, and that he further acknowledged that the seal thereto affixed is the genuine corporate seal of the said Company, and that he caused the same to be duly attested by J. H. Ambrose, the Secretary of said Company.

Witness my hand and seal at office in Nashville, Tennessee, this fifth day of December, 1902.

E. B. DUVAL, Notary Public.

STATE of TENNESSEE,
County of Davidson.

Register's Office, December 24th, 1902.

I, BEN. F. LOFTIN, Register for said County, do certify that the foregoing instrument and certificate are registered in said office, in Book No. 272, page 407, that they were received Dec. 11, 1902, at 5 o'clock p. m., and were entered in Note Book 18, page 227.

BEN. F. LOFTIN,
Register of Davidson County.
By W. H. LINGNER, D. R.

STATEMENT OF LIST OF INDUSTRIES SERVED BY THE TENNESSEE CENTRAL RAILROAD AT NASHVILLE, ENCLOSED WITH LETTER FROM S. W. FORDYCE, JR., TO THE SECRETARY OF THE COMMISSION, DATED OCTOBER 30, 1914.

RECAPITULATION
OF
Industries Served by the Tennessee Central R. R. Co.,
AT
Nashville, Tennessee.

LOCATION.	Total Number of Concerns, regardless of whether or not there is a common ownership of any of them.	Total Number of Separate Concerns, that is, counting only one where there is a common ownership.
On T. C. R. R. exclusively (Lists 1, 2, 3 and 4.)	101	94
Served by independent tracks of T. C. R. R. and L. & N.-N., C. & St. L. terminals (List 5.)	32	32
Served by joint tracks of T. C. R. R. and L. & N.-N., C. & St. L. terminals (List 6.)	24	22
TOTAL	157	148

Nashville, Tenn., October 15, 1914.

LIST No. 1.

INDUSTRIES LOCATED ON TENNESSEE CENTRAL RAILROAD BASIN ALLEY TRACK, SOUTH OF BROAD STREET.

NAME OF INDUSTRY.	CHARACTER.
Doss Transfer Company	Transfer and Storage
Nichols & Shepard	Engines and Threshers
W. T. Hardison & Co	Builders Supplies
R. H. Worke & Co	Hay, Grain and Feed
†H. G. Lipscomb & Co. (also in List 2)	Implements and Wire Fence
Wizard Products Co	Sweeping Compound
Emerson-Brantingham Implement Co	Implements, Buggies, etc.
†Price-Bass Company (also in List 4)	Coal Yard
Morehead & Young	Hay, Grain and Feed
J. Leftkovitz & Co	Hides, Wool, etc.
(a) American Steam Feed Co	Stock Feed
(a) Nashville Feed Co	Stock Feed
Tune & Wright	Poultry, Butter and Eggs
Ollie Alloway	Poultry, Butter and Eggs
(h) Werthan Bag & Burlap Co	Burlap Bags
(h) Werthan & Co	Scrap Iron
Warren Paint & Color Co	Paint
National Biscuit Co	Crackers, etc.
Union Carbide Sales Co	Carbide
Meyer Roth	Scrap Iron and Paper Stock
B. Baff & Sons	Poultry and Eggs
Loose-Wiles Biscuit Co	Crackers, etc.
Philip Carey Roofing Co	Roofing
McLemore-Crutcher Co	Hay, Grain and Feed
Warren Bros	Glass Warehouse

(a)—Same firm operating under two names.
(h)—Same firm operating under two names.
†—Two locations.

sion is questioned, but with a case where the sole question is whether or not there was substantial evidence to support the finding of the Commission. The three judges, neither in their opinion nor in the order granting a temporary stay until this court should act upon the motion now made, have indicated the slightest doubt of the correctness of their conclusion. Indeed, the court went beyond what was required to uphold the order attacked and expressly approved the conclusions of the Commission.

Counsel for appellants seem to suppose that the parties to this appeal are the carriers on the one side and the shippers on the other, losing sight entirely of the fact that the injunction sought is against the Interstate Commerce Commission, a public administrative tribunal, whose decision here involved has already been reviewed and approved by three federal judges sitting in banc. Even if there be discretion to stay the order of the Commission after it has been thus approved, that discretion ought not to be exercised except in a very clear case.

V.

AS A GENERAL RULE THIS COURT WILL NOT MAKE AN ORDER TO MAINTAIN THE EXISTING STATUS UNLESS THAT STATUS EXISTS BY VIRTUE OF SOME ACT OF THE CHANCELLOR.

Where the chancellor has granted an interlocutory injunction the status thus created is one which exists by virtue of an act of the chancellor, and the same is true of the status which may exist by

virtue of the dissolution of an interlocutory injunction. While the status which may exist by reason of the dissolution of the injunction may be the same status which existed before any action was ever taken by the chancellor, it nevertheless exists by virtue of the chancellor's action in dissolving the injunction.

In *Chegary* v. *Scofield*, 5 N. J. Eq., 525, 530, where the question was as to the power of the New Jersey Court of Errors and Appeals to keep in force pending an appeal an injunction which had been dissolved by the chancellor, which restrained the sheriff from delivering a deed to the purchaser at a sheriff's sale, it was insisted for respondents that there was a distinction between the power of the court to restrain them from doing something which they derived their authority to do from the chancellor, and the power to restrain them from doing a thing which they were at liberty to do before any bill was filed, and the court held that while the distinction might be a sound one it had no application to the facts of that case. Chief Justice Hornblower, with whom a majority of the justices concurred, said:

> The argument is that as the chancellor only dissolved the injunction, the sheriff was at liberty to act just as he might have acted before the bill was filed. It was just as if no injunction had ever been issued; that he was not executing any decree; he was not proceeding in the cause; he was not doing anything

> for the doing of which he derived his authority from the chancellor.
>
> It seems to me the inconclusiveness of this argument must appear by simply asking the question whether, after this bill was filed and after the chancellor had granted the injunction, the sheriff could have delivered the deed without the chancellor's permission? Certainly he could not; and then it is by the authority and permission of the court of chancery, and in virtue of the chancellor's judicial decision, that he acts in the matter and delivers the deed. It is this very decree that the appellant complains of in this court, and he comes here to get it reversed.

In every case cited by counsel for appellants in which either the lower court or this court granted a stay pending appeal there had been a restraining order or interlocutory injunction in effect in the lower court at some time prior to the decision appealed from, and after diligent search we have been unable to find any case in which any court has granted an injunction pending an appeal from an order dismissing a bill for an injunction where no injunction or restraining order had been granted in the lower court prior to the final decision of the case.

In *Leonard* v. *Ozark Land Company*, 115 U. S., 465, 468, this court, by Mr. Chief Justice Waite, said:

> This court no doubt has the power to modify an injunction granted by a decree

below in advance of a final hearing of an appeal on its merits. An application to that effect was made to us at the October Term, 1878, in the case of the *Sandusky Tool Co.* v. *Comstock* [not reported], and finding that such a practice, if permitted, would oftentimes involve an examination of the whole case and necessarily take much time, we promulgated the present equity rule 93, which is as follows:

"When an appeal from a final decree in an equity suit, granting or dissolving an injunction, is allowed by a justice or judge who took part in the decision of the cause, he may, in his discretion, at the time of such allowance, make an order suspending or modifying an injunction during the pendency of the appeal, upon such terms as to bond or otherwise as he may consider proper for the security of the rights of the opposite party."

The rule there quoted is now equity rule No. 74. The court did not provide for the granting of an injunction pending appeal where none had been granted, and it must have had a reason for not doing so. Since the court by the adoption of that rule was seeking to avoid an examination of the whole case upon such motions, it was just as important, if the two cases are governed by the same principle, to provide for the case where no injunction had been granted by the chancellor as it was to provide for a case where an injunction had been dissolved, and the fact that the former case was not provided for indicates clearly that it was the

view of this court that such an application should not in any case be considered.

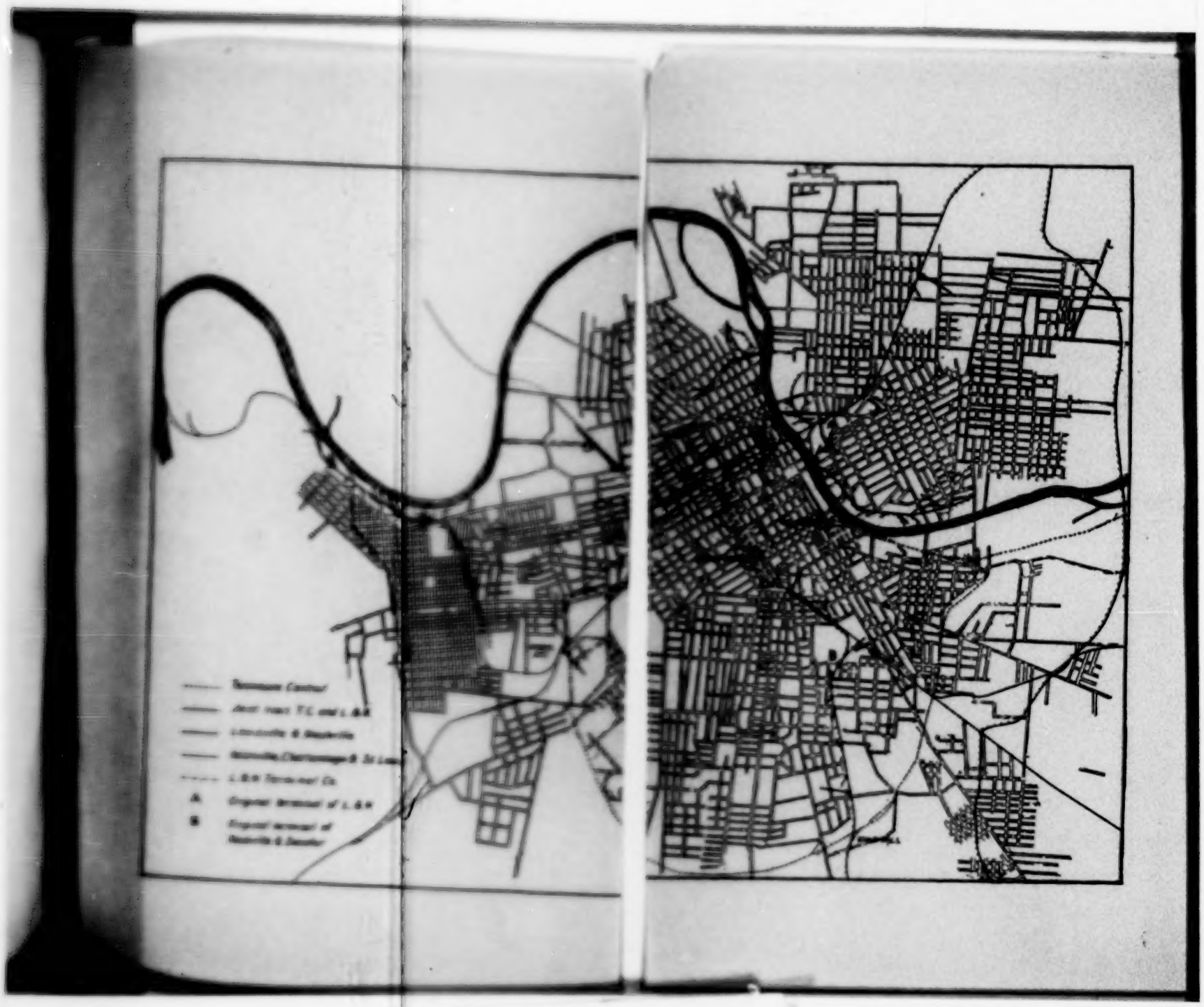
To dismiss a bill for an injunction after full hearing, and without any expression of doubt as to the correctness of the conclusion that the petitioners are not entitled to an injunction, and yet by the same decree to grant an injunction pending an appeal would be an anomaly in the law, and for that reason, no doubt, equity rule No. 74 makes no provision for such a case. The failure to make provision for such a case indicates at least that the case which would warrant such anomalous action must be most unusual.

This court has the inherent power recognized in section 262 of the Judicial Code to issue any writ necessary to make its jurisdiction effectual. If it appears that the subject matter of the litigation may be destroyed pending the appeal or that the right of appeal will be of no substantial value, if the existing status is not continued pending the appeal, the court may make an order maintaining the *status quo*. The mere fact, however, that the appellant may suffer substantial financial loss pending the appeal if the *status quo* is not maintained furnishes no reason for maintaining the existing status if the right sought to be established by the appeal is a continuing one and would be of great value for the future. In such a case the jurisdiction is not dependent on the preservation of the existing status pending the appeal.

That writs of *supersedeas* will be granted by this court only in exceptional cases is shown by what was said *In re McKenzie*, 180 U. S., 536, 549. In that case the court said:

> Although the issue of the writ is not ordinarily required there are instances in which it has been done under special circumstances and in furtherance of justice.

This case is quite different from the case of *Louisville & Nashville R. Co.* v. *Siler*, 186 Fed., 176, 203. In that case a temporary restraining order was in effect when the district court acted upon the application for an interlocutory injunction, and that order was kept in effect by the district court pending an appeal denying an interlocutory injunction, but only upon condition that the appellant pay into court the difference between the existing rate and the rate prescribed by the suspended order of the railroad commission of Kentucky, and no objection was made to that part of the decree. In that case the appellant would have had no remedy for the loss suffered in the event of reversal if the order had gone into effect, while the shippers were given a reasonably adequate remedy in the event of affirmance by requiring the difference between the two rates to be paid into court. Besides, that was a suit to annul an order of a state railroad commission, to which a different statute applied.



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Decatur connected with the Nashville & Chattanooga near the terminus of the Nashville & Decatur. On May 1, 1872, the Nashville & Chattanooga, for an agreed annual rental, accorded to the Louisville & Nashville a perpetual right to run its trains and locomotives over a track to be constructed for the Nashville & Chattanooga by the Louisville & Nashville from the trestle then connecting the Louisville & Nashville's northern line with the Nashville & Northwestern to the depot grounds of the Nashville & Chattanooga; thence over the tracks of the Nashville & Chattanooga through said depot grounds; thence over a track to be constructed by the Louisville & Nashville as its own property from the southern approach to the Nashville & Chattanooga depot grounds to the depot of the Nashville & Decatur, alongside of the existing track of the Nashville & Chattanooga, the necessary right of way to be furnished by the Nashville & Chattanooga. It was also agreed that the Louisville & Nashville would contribute $50,000 toward the construction of a union passenger station on the depot grounds of the Nashville & Chattanooga whenever the Nashville & Chattanooga should contribute an equal amount for the same purpose. The tracks provided for in the agreement were constructed immediately, but not the union passenger station. In 1873 the name of the Nashville & Chattanooga was changed to Nashville, Chattanooga & St. Louis. In 1893 and to facilitate the construction of a union passenger station as tentatively proposed in the agreement of 1872, the Louisville & Nashville and Nashville, Chattanooga & St. Louis organized the terminal company. The general incorporation laws of Tennessee were amended March 17, 1893, to authorize the organization of railway terminal corporations, Laws of Tennessee, 1892, ch. 11, p. 15; and on March 23, 1893, the terminal company was incorporated under them. Following its organization the terminal company existed in name only until April 27, 1896, when the Louisville & Nashville and Nashville, Chattanooga & St. Louis leased to it for a period of 999 years all of its property and railroad appurtenances thereon which the lessors severally owned or controlled within, or in the immediate vicinity of, the original depot grounds of the Nashville & Chattanooga. The terminal company covenanted to construct upon the premises demised and other premises to be used in connection there-

with all passenger and freight buildings, tracks, and other terminal facilities suitable and necessary for all railroads centering at Nashville that might contract with the terminal company therefor. Shortly thereafter, June 15, 1896, the terminal company leased back to the Louisville & Nashville and Nashville, Chattanooga & St. Louis jointly all property acquired by the terminal company under the lease of April 27, 1896, together with all other property which the terminal company has subsequently acquired or which it might acquire. Both the charter of the terminal company and the act under which it was incorporated authorized the terminal company to lease its property and terminal facilities to any railroad company utilizing them upon such terms and for such time as might be agreed upon by the parties. Meanwhile the people of Nashville had become desirous of better terminal facilities, particularly of a union passenger depot, and an ordinance authorizing a contract to that end between the city and the terminal company had been proposed, but with the proviso that the facilities proposed should also be available on an equitable basis to railroads which might be built in the future. The Louisville & Nashville and Nashville, Chattanooga & St. Louis opposed this proviso and an ordinance omitting it was passed, but was vetoed by the mayor on account of the omission. Nothing more was done until June 21, 1898, when the terminal company entered into an agreement with the city of Nashville whereby the terminal company agreed to construct a union passenger station on the premises covered by the leases of April 27 and June 15, 1896, at least two freight stations, platforms, tracks, switches, etc., certain viaducts over its tracks, and certain new streets and extensions of existing streets. The city agreed to secure the condemnation of land, to close certain existing streets, and to erect approaches to certain of the viaducts to be constructed by the terminal company. No provision was made for future railroads. The improvements agreed upon were duly made at a cost of approximately $100,000 to the city and of several million dollars par value of bonds to the terminal company, which bonds were guaranteed by the Louisville & Nashville and Nashville, Chattanooga & St. Louis as authorized by the terminal company's charter, and were used to repay funds advanced by the guarantors to the terminal com-

pany and expended by the latter for the construction of the facilities which it had undertaken to construct. Pursuant to this agreement the terminal company constructed a union passenger station, two adjoining freight depots, a roundhouse, some coal chutes, and adjoining yard tracks. The tracks constructed are connected with the tracks of the Louisville & Nashville and of the Nashville, Chattanooga & St. Louis, but not with the tracks of the Tennessee Central. On December 3, 1902, the lease of June 15, 1896, from the terminal company to the Louisville & Nashville and Nashville, Chattanooga & St. Louis jointly was modified and in part rescinded. The duration of the lease was reduced from 999 to 99 years, its monetary considerations were modified, and the lessees were reinvested in severalty with their original titles to all the property leased by them to the terminal company April 27, 1896, except for the intervening lien of the first mortgage for $3,000,000 which had been given to secure the terminal company's bonds.

The Louisville & Nashville owns all of the capital stock of the terminal company and 71.776 per cent of the outstanding capital stock of the Nashville, Chattanooga & St. Louis, which it began to acquire in 1880.

Prior to August 15, 1900, the Louisville & Nashville and Nashville, Chattanooga & St. Louis operated their respective terminals independently. Each road switched for the other at a charge of $2 per car, but on competitive traffic the switching charge was absorbed. Since August 15, 1900, all of their terminal facilities, including the terminal buildings, tracks, and other facilities leased by them jointly from the terminal company, except their individual team tracks and separate freight depots, have been maintained and operated jointly. The arrangement is called the "Nashville terminals" and is managed by a board of three, composed of the general managers of the two roads and a superintendent of terminals. The total expense of maintenance and operation is apportioned monthly between the two roads on the basis of the total number of cars and locomotives of all kinds handled for each. The association is not incorporated and is not a terminal company in the sense that the principal purpose of its existence is "to furnish terminal facilities for carriers which lack them." It is a joint agency voluntarily constituted by the Louisville & Nashville and Nash-

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1915.

No. 711.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, ET AL., - - - - - - - - - *Appellants,*

versus

UNITED STATES OF AMERICA, ET AL., - - *Appellees.*

APPELLANTS' REPLY BRIEF ON MOTION FOR AN ORDER MAINTAINING *STATUS QUO.*

In this reply to appellees' brief upon the motion for an order maintaining the *status quo*, the appellants will discuss the various propositions put forth by the appellees in the order of their presentation in the appellees' brief.

I.

Has the Exact Question Involved on this Appeal Been Decided by this Court?

As foretold in our original brief, appellees insist that the question here involved is foreclosed by this court's decision in what is known as the Nashville Coal Case

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NOTE—Italics ours.

(238 U. S. 1). This is an evasion of the present contest and the raising of a collateral and improper issue as to the merits of which this record is necessarily silent, since there was no plea of former adjudication, nor other pleading, which would have given the appellants an opportunity to show the marked difference between the facts of the two cases.

The opinions, however, of the Commission, of the District Court and of this court, in that case, with slight reference to the record therein, show with sufficient definiteness how unlike they are.

There the principal contest related to certain important coal rates to Nashville from various mining points. As a manifestly subordinate addition to the main demand, there was a complaint that the L. & N. and N., C. & St. L. were discriminating against coal because under their tariffs they switched at Nashville all non-competitive freight for the Tennessee Central except coal. There was no complaint of a failure to switch *competitive* freight for the Tennessee Central (the issue in our case) on the ground that the two roads switched competitive freight for each other, or upon any other ground.

On the contrary, only the tariff relating to non-competitive freight (that is freight originating at or destined to points which the L. & N. and N., C. & St. L. did not reach) was in controversy, the claim being made that to switch non-competitive lumber, flour and other commodities and to refuse the same privilege to non-competitive *coal* was a discrimination against that commodity in violation of the Act.

The case was prepared and tried on these lines. The Commission, in its opinion, reduced the coal rates and also held the coal switching practice to be discriminatory. The railroad companies brought suit to enjoin the order and made application for an interlocutory injunction. Upon that preliminary motion the record of the proceedings before the Commission was not filed, because counsel conceived that the facts shown in the Commission's report itself did not as a matter of law justify the order. As to the switching question it was their opinion that even granting, for the sake of that motion, that the facts found by the Commission existed, the Commission had no authority over terminal movements because of the proviso to Section 3 of the Act, which seemed to withdraw from the Commission jurisdiction over terminals. The court held that assuming the Commission found the facts correctly, which, as stated, the railroads for the purposes of that motion did not controvert, there was a discrimination which came within the prohibition of the Act. This question never having been decided by this court, an appeal was taken on October 27, 1914. But on February 23, 1915, this court rendered its opinion in *Pennsylvania Company* v. *United States*, 236 U. S. 351, holding that it was a discrimination covered by the Act for the Pennsylvania Company, at Newcastle, Pa., to switch competitive freight for three railroads and to refuse the same service to a fourth. On the strength of this case the switching branch of the Nashville case was affirmed.

What was the fact found by the Commisson which controlled both courts in their opinion and which appel-

lees ask shall control this court in this case? It was that the two railroads operated their individually owned tracks *independently* and *switched for each other.* This was not involved in that case, was not argued by the railroads and was not necessary to the decision of the question of commodity discrimination involved in that case. That declaration of the Commission was contained in a half-page introductory statement of the historical facts, which were not connected, as at all essential, with the subsequent argument of the Commission upon the question of discrimination against coal and which did not begin to show all the facts bearing upon the true relations of the two companies.

In the Commission's ten-page opinion, there is no discussion of this question of *switching for each other* (so vital in our case) and no reference even to it, except the following brief statement in the above-mentioned introduction:

> "Both the Louisville & Nashville and the Nashville, Chattanooga & St. Louis *have individually owned tracks which they operated independently* each of the other or of the Terminal Company, and upon these tracks industries are located. To and from these industries as well as to and from those on the rails of the Terminal Company *traffic of all kinds is freely interswitched* by the Louisville & Nashville and the Nashville, Chattanooga & St. Louis."

We know from the present record that these companies do not operate their individually owned tracks independently, and we believe it to be equally clear that

the facts, which are uncontroverted, do not in law constitute a switching for each other.

That the District Court relied upon the above-quoted innocent statement is apparent from the quotations at page 24 of our brief. The same is true of this court's opinion. For example, referring to the Commission's order, this court said:

> "It found that *each switched for the other* and both switched for the Tennessee Central, except as to 'coal and competitive business.'"

And in summing up its conclusion:

> "In this case the controlling feature of the Commission's order is the prohibition against discrimination. It was based upon the fact that the appellants were at the present time *furnishing switching service to each other* on all business, and to the Tennessee Central on all except coal and competitive business."

Appellees now seek to bind this court and appellants to the adoption of a certain alleged fact as true, whose existence is here in issue, because in another and different case the parties saw fit, on a preliminary motion, to test the sufficiency in law of such alleged fact without denying its existence. This position is wholly untenable.

months ending January 31, 1914, defendants delivered to the Tennessee Central for placement in Tennessee Central industries 245 loaded cars and 196 cars for transportation as compared with 952 cars received by defendants from the Tennessee Central for placement by the Nashville terminals and 104 cars received for transportation. These figures furnish some evidence that defendants together potentially control more traffic to and from Nashville than the Tennessee Central potentially controls and that defendants together may lose more competitive traffic through reciprocal switching than they will gain, although the figures given relative to the number of cars actually interchanged apparently relate exclusively to noncompetitive traffic. These comparisons, however, are irrelevant. Only the effect of reciprocal switching on defendants' lines individually is relevant, and as to this the record is silent. Neither is there any evidence that the interchange of traffic between defendants' lines is mutually advantageous. If not mutually advantageous one line at least can not urge lack of mutual advantage against reciprocal switching with the Tennessee Central. If the Nashville, Chattanooga & St. Louis, for example, is willing to interchange traffic with the Louisville & Nashville, even though it loses more traffic than it gains, it is not in a position to refuse to interchange traffic with the Tennessee Central solely on the ground that more traffic will be lost than gained. Defendants assert that the industries served by them through the Nashville terminals are about equally divided between their respective lines. This does not prove, however, that the volume of traffic to and from the two groups of industries is the same or that the interchange of traffic between the two lines is mutually advantageous. General assertions are insufficient, moreover, to prove that reciprocal switching arrangements are mutually advantageous. More definite evidence should be given, preferably figures showing the precise amount of traffic surrendered or gained by each road participating in the arrangement. *Switchings at Galesburg, Ill., supra.*

The Louisville & Nashville interswitches competitive and noncompetitive traffic on the same terms with other carriers at several other points, notably Memphis, Tenn., and Birmingham, Ala., while the Nashville, Chattanooga & St. Louis admittedly interswitches both kinds of traffic

at the same rates with all connections at all points of connection with other carriers, except Nashville and Lebanon, Tenn., where it connects with the Tennessee Central. Since November 14, 1914, a switching charge of $2 per car for both kinds of traffic has been in effect at Lebanon. We do not find any substantial evidence that the conditions peculiar to the interchange of competitive traffic at such other points are substantially unlike the conditions at Nashville or that the interchange is mutually advantageous at such other points. Under these circumstances we think the almost unique policy pursued at Nashville requires more to justify it than has been shown.

The only use of defendants' "tracks or terminal facilities" asked by complainants for the Tennessee Central is the use incidental to the movement of Tennessee Central cars by defendants to and from industries on defendants' tracks. No use by Tennessee Central trains is asked, nor any use of defendant's freight depots or team or storage tracks. In the latter case defendants' tracks would be used for transportation conducted by the Tennessee Central. In the case of the use actually asked defendants will conduct the transportation, and the difference is more than a mere difference in degree.

Most of the industries involved are situated from 2 to 7 miles from Shops Junction. The service asked is a railroad haul, and in our opinion constitutes transportation, as defendants tacitly concede when they argue that the local rates to and from Shops Junction and Vine Hill at which they had moved Tennessee Central competitive traffic are transportation rates for transportation to and from local points. Section 1 of the act requires railroads subject to the act to furnish transportation, including the transportation of cars of connecting carriers. Since adequate provision is made for the return of cars interchanged and for compensation for their use, and the use of tracks incidental to transportation conducted entirely by the carrier whose tracks are used is the very use which railroads are constituted to afford, no property is "taken" by these provisions. *G. T. R'y Co.* v. *Michigan R'y Comm.*, 231 U. S. 457; *C., M. & St. P. R'y Co.* v. *Iowa*, 233 U. S. 334; *C., I. & L. R'y Co.* v. *Railroad Commission*, 95 N. E. 364; *Pa. Co.* v. *U. S.*, 214 Fed. 445; *St. L. & P. R. R. Co.* v. *P. & P. U. R'y Co.*, *supra*.

Complainants contend, moreover, that the local rates applied by defendants for the movement of Tennessee Central competitive traffic to and from Shops Junction have been applied as switching charges and that defendants have voluntarily subjected their tracks and terminal facilities to the use now asked for the Tenessee Central. The contention is not without merit. Defendants' terminals are admittedly open to noncompetitive Tennessee Central traffic; and the publication by the Nashville, Chattanooga & St. Louis of the rates to and from Shops Junction to apply on competitive Tennessee Central traffic in its terminal tariff from December 14, 1913, to January 25, 1914, constituted a distinct representation to the public that Tennessee Central competitive traffic would be switched at those rates by the Nashville, Chattanooga & St. Louis. Defendants explain this action on the ground that the expansion of the city had rendered Shops Junction an intracity or intraterminal point. Shippers, however, were under no duty to go behind the face of the tariff. Furthermore, no traffic other than Tennessee Central traffic is handled by defendants at Shops Junction, no pay station is maintained there, and defendants' tracks are not accessible at that point either by roadway or street. The Louisville & Nashville local rates similarly applied, which, as previously stated, are the rates between Nashville and Overton, Tenn., with intermediate application at Vine Hill, have never been published in the Louisville & Nashville terminal tariffs, but, on the other hand, have been applied to and from Shops Junction, which point is reached by the Louisville & Nashville only, through the operations of the Nashville terminals and over the rails of the Nashville, Chattanooga & St. Louis. It is fairly arguable, therefore, that the Louisville & Nashville also has applied its local rates as switching charges. But if defendants have voluntarily opened their terminals to Tennessee Central traffic they are not being compelled to do so. *M. & M. Asso.* v. *P. R. R. Co.*, 23 I. C. C. 474; *Traffic Bureau of Nashville, Tenn.*, v. *L. & N. R. R. Co., supra; Botsford & Barrett* v. *P. R. R. Co.*, 29 I. C. C. 469; *Seattle Chamber of Commerce* v. *G. N. R'y Co.*, 30 I. C. C. 683.

The virtually prohibitive charges imposed by defendants for switching competitive Tennessee Central traffic at Nashville cause Nashville shippers little direct pecuni-

ary loss. Industries located on any of the three lines can avoid the switching charges imposed by the others by shipping over the line on which they are located. They are subject, however, to all the disadvantages of service by a single railroad. Shipments are frequently misrouted. If the railroads are shown to be at fault, delivery is made by drays at the railroad's expense, but only after the consignee has prepaid all charges, including drayage charges, and provided the consignee has notified the railroad of the error in routing before accepting the shipment. Delivery is delayed and frequently goods are damaged by drayage. Lumber merchants located on defendants' lines can not profitably take advantage of the milling-in-transit service accorded at Nashville by the Tennessee Central. Shipments may be delayed because of a car shortage on one line, although another line has a surplus of cars. Industries located on one line lose customers at other points who prefer shipment over the other lines. These disadvantages to shippers affect Nashville as a city and hinder its growth as an industrial center.

Under all of the circumstances disclosed we are of the opinion and find that defendants' refusal to switch competitive traffic to and from the Tennessee Central at Nashville on the same terms as noncompetitive traffic while interchanging both kinds of traffic on the same terms with each other is unjustly discriminatory, and that so long as defendants switch both competitive and noncompetitive traffic for each other at Nashville at a charge equal to the cost of the service, exclusive of fixed charges, the charges imposed for switching Tennessee Central traffic should not exceed the cost of the service performed.

Since defendants impose no charge upon shippers for the service performed by the Nashville terminals they virtually absorb the charges which they impose upon each. The charges imposed by the Tennessee Central for switching defendants' traffic are not absorbed, either in whole or in part. However, discrimination in the matter of the absorption of charges is not alleged in the complaint nor discussed in the record and therefore can not be considered.

It appears that there are more than 20 industries at Nashville which the Nashville terminals and the Tennes-

see Central both serve, over the same lead tracks. There is no evidence, however, that these industries are unduly preferred to the detriment of other industries at Nashville.

The Tennessee Central switches competitive and noncompetitive grain to and from defendant's lines from and to the Hermitage elevator located on its tracks several miles north of Shops Junction at a charge of $2 per car, but refuses to accord this rate to other grain dealers located on its tracks at Nashville. Complainants challenge the discrimination. The conditions are not identical, but we do not find that they are sufficiently dissimilar to justify different switching charges. We find that the Tennessee Central unduly prefers the Hermitage elevator.

An order will be entered in accordance with the conclusions herein expressed.

HARLAN, *Chairman,* dissents.

EXHIBIT G.

ORDER.

At a general session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 1st day of February, A. D. 1915.

No. 6484.

CITY OF NASHVILLE AND TRAFFIC BUREAU OF NASHVILLE,

v.

LOUISVILLE & NASHVILLE RAILROAD COMPANY; LOUISVILLE & NASHVILLE TERMINAL COMPANY; NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY; NASHVILLE TERMINAL COMPANY; TENNESSEE CENTRAL RAILROAD COMPANY; AND H. B. CHAMBERLAIN AND W. K. McALLISTER, RECEIVERS THEREOF.

This case being at issue upon complaint and answers on file, and having been duly heard and submitted by the parties, and fully investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

It is ordered, That defendants Louisville & Nashville Railroad Company, Nashville, Chattanooga & St. Louis Railway, and Louisville & Nashville Terminal Company be, and they are hereby, notified and required to cease and desist, on or before May 1, 1915, and thereafter to abstain, from maintaining a practice whereby they refuse to switch interstate competitive traffic to and from the tracks of the Tennessee Central Railroad Company at Nashville, Tenn., on the same terms as interstate non-competitive traffic, while interchanging both kinds of said

> main the right and power to construct their own terminals. But the situation at St. Louis is most extraordinary, and we base our conclusion in this case, in a large measure, upon that fact."

It is true that this court in that case, to an extent, condemned the method of organization of the Terminal Railroad Association as a violation of the Sherman Act, and required it to be reorganized so as to provide a definite way for new railroads to be admitted into the company; but this finding was expressly made to rest upon the peculiar situation at St. Louis, which the court thus described:

> "The result of the geographical and topographical situation is that it is, as a practical matter, impossible for any railroad company to pass through, or even enter St. Louis, so as to be within reach of its industries or commerce, without using the facilities entirely controlled by the Terminal Company."

This case came back to the Supreme Court on appeal from the order carrying out its mandate and the court in 1915, in approving the plan of reorganization under which other railroads could come in on equitable terms, reaffirmed the doctrine of the former opinion that, except in a peculiar case like that at St. Louis, it was lawful for independent carriers to combine for the purpose of obtaining terminal facilities. (236 U. S. 206.) But even in St. Louis the railroad desiring to come in did not do it for a switching charge but was required to pay its equitable proportion of the cost and maintenance of the property.

4. In this connection, as bearing upon the Commission's general idea of this Nashville situation, it is significant that the Commission in the Nashville Coal case got around this joint arrangement by taking as a precedent the action of the court in the above St. Louis Terminal Company case.

After announcing its conclusion that the practice of the L. & N. and N., C. & St. L. was unjustly discriminatory and declaring that they should be required to discontinue it, the Commission said:

> "This disposition of the case is in consonance with the principle enunciated by the Supreme Court in U. S. v. Terminal R. R. Asso. of St. Louis, 224 U. S. 383."

Such a conclusion was unjustified both because the Commission has no power to administer the Sherman Act and because, if it had, the monopolistic geographical conditions existing at St. Louis did not exist at Nashville, where the Tennessee Central was not only not excluded but was doing business with extensive terminals of its own throughout the city, and had never made a complaint to Commission or court.

III.

Irreparable Injury.

Counsel disposes of the testimony of A. R. Smith and Chas. Barham, leading traffic officials of appellants, that the two companies would sustain a net loss of $16,000 per month, if the Commission's order is put into effect, by declaring it to be "purely speculative"; but he does not point out any flaws in either the facts or the logic of their statements. Each shows the number of competitive cars of freight handled annually by the road he represents together with the net earnings thereon. It is then shown that the Tennessee Central connects with the Southern Railway system, and with the Illinois Central. The aggregate mileage of the Southern Railway and its allied lines is shown to be 10,171 miles and that of the Illinois Central 6,141 miles.

It will be understood that the freight under consideration is competitive freight, that is freight from or to points of origin or destination which the Tennessee Central and its allied lines can reach as well as the L. & N. and N., C. & St. L. It is further stated that the aggregate number of freight solicitors in the employ of the Illinois Central, Southern Railway, Queen & Crescent and Tennessee Central (not counting those of the Southern Railway's other allied interests) total 323, whereas the freight solicitors of the L. & N. and N., C. & St. L. aggregate 130. These 323 solicitors, scattered over 16,312 miles of railroad, to say nothing of their con-

nections, will have a chance at every car of freight going to Nashville, if it is known throughout the country that those lines can deliver upon the L. & N. and N., C. & St. L. terminals as well as can the owners of those terminals. The rate being the same, this request for a division of business will undoubtedly meet with many favorable responses. Mr. Smith estimates that 25% of the inbound competitive traffic would thus be diverted to the Tennessee Central and its connections and that the solicitation of the local men at Nashville, backed by the known interest of the city of Nashville as a stockholder in the Tennessee Central, would divert 15% of the outbound competitive traffic. These figures appear upon their face to be entirely conservative. They represent the deliberate judgment of the two men, who, best of all others, are qualified to speak upon the subject; and their testimony is wholly uncontroverted. Mr. Smith's statement as to how this would work is pertinent here (Record, Vol. 1, page 48):

> "Should reciprocal switching be practiced at Nashville, whereby the Tennessee Central R. R. will have access to all industrial side tracks on the Louisville & Nashville R. R., or those jointly controlled with the Nashville, Chattanooga & St. Louis Railway, extraordinary efforts would be put forth by the soliciting representatives and other officers of the Tennessee Central R. R., to secure as much competitive traffic as possible for and from their competitors' terminals. Inasmuch as the primary revenue interests of the Southern Railway, Queen & Crescent, and Illinois Central will be to secure as much traffic as they can for their longer and more remunerative routes, the efforts of the Tennessee Central would be

ably assisted by the numerous soliciting representatives of said lines. These combined efforts will necessarily meet with a considerable degree of success. As a rule, the 'home line' always possesses a measure of strength in the good will of the shippers. The lines of the Illinois Central, Southern Railway and Queen & Crescent cover such a vast amount of territory, that there is a large volume of traffic which is originated by them or which they deliver at stations, local and competitive, reached by their lines. Shippers and receivers on these lines can be much more readily reached by the agents and representatives of said lines, for the purpose of soliciting their traffic or influencing them, than by the representatives of the Louisville & Nashville R. R. or the Nashville, Chattanooga & St. Louis Railway. Shippers and receivers located on the tracks of the latter lines at Nashville, mostly entertain friendly sentiments towards their home lines, nevertheless they are all susceptible to solicitation, and while the representatives of the Louisville & Nashville R. R., as to its shippers hope to continue to receive the major share of their traffic, even under a reciprocal arrangement, we are bound, under the most favorable conditions, to lose a proportion of it."

Another significant feature that bears upon the part that will be played by the Southern Railway system and the Illinois Central, if the Tennessee Central is given access to appellants' terminals, is the fact that the Southern Railway and Illinois Central own the Tennessee Central's terminals at Nashville, title to which is in the name of a corporation called the Nashville Terminal Company. Of this Mr. Smith says:

"It is a matter of common knowledge that the Nashville Terminal Company, which supplies virtually all the terminal facilities of the Tennessee

Central R. R. in the city of Nashville is owned, not by that line, but by the Illinois Central and Southern Railway, jointly or severally, which fact we may assume lends strongly to the interest those lines each may have in routing traffic via the Tennessee Central Railroad."

In this connection we call attention to the error of counsel for appellees in discussing the amount of this loss, when he says, near the conclusion of the discussion of this question, "But the real test of the loss which the appellants would suffer is not the gross revenue from the business which would be diverted, but the net revenue, and this it is estimated would be about $100,000 per year. (Rec., Vol. 1, p. 45.)"

Counsel here, through evident inadvertence, says that the statement at the page mentioned referred to the aggregate net loss sustained by the two companies. Reference, however, to the citation given will show that it was Mr. A. R. Smith's testimony as to the net loss of the L. & N. alone, amounting to $106,380. Mr. Barham, at page 55 of Vol. 2, states that the net loss of the N., C. & St. L. would be not less than $84,150. The sum of these two, representing the total net loss of the two companies, is $190,530 per annum, which by a typographical error, appears in our original brief as $192,530. This is about $16,000 per month.

But if this amount of damage would be suffered by enforcing the order, counsel claims that not to enforce it would cause an equal loss to the Tennessee Central, which has, therefore, lost $2,000,000 in the past fifteen years and should not lose any more. But this is not a suit by

sion requiring appellants, Louisville & Nashville Railroad Company and Nashville, Chattanooga and St. Louis Railway, to switch competitive cars for the Tennessee Central Railroad Company at Nashville upon the ground that they switched such cars for each other, and hence that their failure to switch them for the Tennessee Central Railroad Company was an unjust discrimination. Thereupon said appellants (plaintiffs below) brought this suit (Rec., Vol. I, p. 4) against the United States, the Interstate Commerce Commission, and the other parties to said proceeding for the purpose of enjoining the execution and enforcement of the Commission's said order. The Louisville & Nashville Terminal Company was joined as a party to the proceedings before the Commission but it is not a railroad company and has no interest in the case.

The application for an interlocutory injunction and temporary restraining order was heard by the court composed of Circuit Judge John W. Warrington and District Judges John E. McCall and Edward T. Sanford at Nashville on April 20, 1915, but was not decided until September 18, 1915. Meantime no restraining order was issued, but at the suggestion of the court the Interstate Commerce Commission postponed the effective date of its order until after the court should reach a decision. The court in its opinion (Rec., Vol. I, p. 39) sustained the validity of the Commission's order, and stated that a decree would be entered denying an injunction and dismissing the bill; but before the decree was entered plaintiffs made application for it to contain a provision suspending

the Commission's order pending an appeal to this court which plaintiffs contemplated taking at once. After a full hearing upon this application, the court on October 22, 1915, filed its second opinion (Rec., Vol. I, p. 77) in which, after a review of the authorities, it upheld the plaintiffs' contention that a court of equity had inherent power to maintain the existing status, pending appeal, even though the bill was dismissed, decided that a temporary suspension pending appeal should be granted, and announced the following finding of facts and its conclusion based thereon:

> "It further appears from the affidavits submitted by the petitioners, which are not controverted, that in the event the decree of this court denying the injunction prayed by the petitioners and dismissing their bill should be reversed by the Supreme Court, a great and irreparable injury would in the meantime have resulted to the petitioners by reason of the diversion of part of their traffic entering and leaving Nashville by competing railroads enabled to obtain access to local industries on their lines through the enforcement of the order of the Interstate Commerce Commission, and the expense and disturbance of their business caused by changing their former practices in the meantime so as to comply with the order of the Commission and the publication of new tariffs. And, on the other hand, it does not clearly appear that any particular individuals would suffer material financial injury in the event the order of the

Commission is stayed for a short time so as to enable the petitioners to perfect their appeal and to present to the Supreme Court an application for a preliminary suspension order of the Commission pending the hearing of the appeal in the Supreme Court, in accordance with the practice recognized in Omaha Street Railway v. Interstate Commission, 222 U. S. 582, 583.

"It results, therefore, that in the opinion of a majority of the court, in view of the importance of the questions involved in this case, and the irreparable injury which will result to the petitioners from the enforcement of the decree in this cause, if reversed, unless a short stay is granted, that the decree whose entry has heretofore been directed denying the preliminary injunction and dismissing the petition, should, under all the circumstances of the case, in the exercise of a sound discretion, be modified so as to provide that if the petitioners shall within thirty days from the entry of such decree take and perfect an appeal to the Supreme Court and also present to that court, within such thirty days, a petition for a preliminary suspension of the order of the Commission pending the determination of such appeal, the enforcement of the order of the Commission should be stayed, until a decision by the Supreme Court upon the question of granting such preliminary suspension of the order of the Commission shall be rendered; provided, however, further, that in addition to the ordinary appeal bond,

the petitioners shall also, at or before the time of the allowance of an appeal, make and file in this court their bond, in the penal sum of $25,000, payable to the clerk of this court, with sureties to be approved by him, conditioned that in the event that petitioners shall not, within thirty days from the entry of such decree, take and perfect an appeal to the Supreme Court and also present to that court, within such thirty days, a petition for a preliminary suspension of the order of the Commission pending such appeal, or in the event the appeal from the decree of this court is dismissed by the petitioners or the decree of this court denying the interlocutory injunction and dismissing the petition is affirmed by the Supreme Court, they will, on demand, pay to the party or parties entitled thereto, all legal damages accruing to them by reason of the stay of the order of the Commission granted by such decree."

The final decree, modified by the insertion of said stay provision, was duly entered on October 22, 1915. (Rec., Vol. I, p. 81.)

Appellants, presenting this petition and motion pursuant to said order, state that the uncontroverted evidence appearing in the record shows that if this case shall be reversed, the net loss which they will have sustained by the enforcement of the Commission's order will amount to $16,000 per month, or $500 per day, with no possibility of recoupment; that this money will go, not to the shipping public represented by complainants

before the Commission, but to appellants' competitors, The Tennessee Central Railroad Company and its connections, none of which were complainants; and that practically the only benefit which will accrue to the interested public at Nashville (the shippers whose industries are located upon appellants' tracks) will be relief from the slight additional expense and inconvenience incident to draying in the very rare and exceptional instances where an inbound car, destined for an industry on appellants' terminal tracks, is accidentally misrouted and comes in over the Tennessee Central instead of over appellants' lines—an occurrence which according to the evidence does not ordinarily happen one time in a thousand.

Appellants further show that, in addition to the above financial loss, a change of the switching practices at Nashville will necessitate the expensive publication throughout the country of new tariffs showing such change, and if the case be reversed, the re-publication of the present tariffs will cause additional expense and great confusion, uncertainty and inconvenience to all other railroads and to all shippers.

As to the merits, appellants state briefly that the single question involved in this appeal is whether or not the facts concerning appellants' switching arrangements at Nashville (which are undisputed and are set out in detail in the court's opinion) constitute as a matter of law, a switching for each other, and hence a facility which, under Section 3 of the Act to Regulate Commerce requiring the furnishing of equal facilities, must be furnished to the Tennessee Central Railroad Company.

"Switching" by one railroad for another, as the term is used in this and similar cases that have come before the Commission and the courts, is the movement of a car of freight between an industry on the terminal tracks of one railroad and the point of interchange with another railroad. Whether it be an outbound car moving from the industry to the point of interchange with the other railroad, or an inbound car moving from the said point of interchange to the industry, *the movement is performed by the engine and crew of the company upon whose tracks the industry is located,* and that company is said to switch for the other.

By the term competitive freight traffic (which the Commission's order requires appellants to switch for the Tennessee Central Railroad Company, because, as it declares, they switch such traffic for each other) is meant freight cars which move to or from industries located upon appellants' terminal tracks at Nashville when the point of origin or of destination can be reached by one or both of appellants and also by the Tennessee Central Railroad, or its connections—and at the same rate. Such cars the appellants decline to switch between the industries on their tracks and the point of interchange with the Tennessee Central Railroad, because thus to give the Tennessee Central access to the appellants' terminals turns over to that company and its connections the line-haul revenue on such shipments as it can successfully solicit, and requires appellants, for a mere switching charge, to handle cars to and from industries on their tracks when they also are ready and able at the same

In the Supreme Court of the United States.

OCTOBER TERM, 1915.

LOUISVILLE & NASHVILLE RAILROAD COMPANY et al., appellants,
v.
UNITED STATES OF AMERICA ET AL. } No. 711.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF TENNESSEE.

MOTION BY THE UNITED STATES TO ADVANCE.

Comes now the Solicitor General, and, in accordance with the provisions of section 2 of the act of June 16, 1910, 36 Stat. 542, and the Urgent Deficiency Act of October 22, 1913, 38 Stat. 208, 220, respectfully moves the court to advance the above-entitled cause for hearing on a day convenient to the court during the present term.

This is an appeal from a final decree of the District Court of the United States for the Middle District of Tennessee, denying a motion for an injunction against the enforcement of an order of the Interstate Commerce Commission, and dismissing the petition of appellants therefor.

The case involves the question, *inter alia*, whether the rates and practices of the Louisville & Nashville

Railroad Company and the Nashville, Chattanooga & St. Louis Railway, established by agreement between the said companies, affecting the switching of competitive carload traffic at Nashville, subjected to undue and unreasonable prejudice and undue discrimination competitive carload traffic received from and delivered to the Tennessee Central Railroad Company, at Nashville, in violation of section 3 of the Act to Regulate Commerce.

The question is one of importance not only to the railroads and the shipping public generally, but also to the Interstate Commerce Commission in the administration of the Act to Regulate Commerce, and for that reason an early determination thereof by this court is desirable.

Opposing counsel concur.

JOHN W. DAVIS,
Solicitor General.

MARCH, 1916.

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